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part 7

Wisconsin Supreme Court
REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

O. M. CONOVER,
 OFFICIAL REPORTER.

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VOLUME XLVIII.

CONTAINING CASES DETERMINED AT THE AUGUST TERM, 1879, AND THE
 JANUARY TERM, 1880.

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JUDGES OF THE SUPREME COURT
OF THE
STATE OF WISCONSIN
DURING THE PERIOD COMPRISED IN THIS VOLUME.

EDWARD G. RYAN,	CHIEF JUSTICE.
ORSAMUS COLE,	} ASSOCIATE JUSTICES.
WILLIAM P. LYON,	
DAVID TAYLOR,	
HARLOW S. ORTON,	

<i>Attorney General,</i>	-	ALEXANDER WILSON.
<i>Clerk,</i>	- - -	CLARENCE KELLOGG.

MEMORANDUM.

No cases on the calendar of the current January term were decided before March 30th. All decisions of an earlier date herein are reported as of the preceding August term.

The dates inserted immediately after the title of each cause in the present volume are respectively those of the submission and of the final determination of the cause.

The chief justice took no part in the decision of the causes, herein reported, which were heard on the 19th day of December, 1879, or after January 10, 1880.

O. M. C.

MADISON, July 30, 1880.

SUPREME COURT RULES.

On the 23d day of June, 1880, by order of the court, the following changes were made in the Rules of Practice in the Supreme Court, adopted August 15, 1876.

I. Rule XV was amended so as to read as follows:

Unless otherwise ordered, not less than twenty causes will be called in their order, exclusive of causes submitted on both sides, at each meeting of the court during the calling of the calendar. When they have been heard, the court will adjourn to consider them, for not less than a week, and the clerk will at once notify counsel by mail of the causes on the next assignment to be heard, and of the day when the court will meet to call them.

II. Rules XVIII and XX were amended so as to require at least *seven* copies of the printed case, and of each of the printed briefs or arguments, to be furnished to the clerk.

CIRCUIT COURT RULES.

On the 23d day of June, 1880, by order of the court, sec. 4 of Rule XVIII of the Rules of Practice of the Circuit Courts, adopted at the August term, 1879, was amended so as to refer to sec. 4115, instead of sec. 4114, of the revised statutes.

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AT THE

August Term, 1879.

BASSETT and another vs. HUGHES.

December 2 — December 16, 1879.

ATTACHMENT: PRACTICE. (1, 3) *Time for trial of traverse to affidavit.*
(2) *Waiver of objection to judgment.*

1. Under secs. 29-32, pp. 1475-6, Tay. Stats., no trial of the traverse to an affidavit for attachment could be had after judgment in the action, standing unreversed.
2. On appeal from the judgment in an attachment suit, the appellant not having moved to vacate the judgment because rendered before trial of his traverse to the attachment, nor assigned that ground for reversal here, the judgment was affirmed. *Held*, that it was then too late to move the court below to vacate the judgment on the ground above stated.
- [3. Under sec. 2745, R. S. (which, however, did not govern this case), the issue upon such a traverse, if made before trial of the action, cannot be tried after judgment.]

APPEAL from the County Court of *Dodge County*.

The following statement of the case is taken, in substance, from the opinion of Mr. Justice TAYLOR:

"Plaintiffs sued defendant in an action upon contract. At the commencement of the suit, they filed a proper affidavit, and caused an attachment to issue against the property of the defendant, upon which his property was attached. Defendant traversed the affidavit upon which the attachment was issued, and filed his answer to the complaint in the action. Afterwards the issue in the action was duly noticed for trial by the plaintiffs, was tried without objection on the part of the de-

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fendant, and the plaintiffs had judgment; and, on appeal to this court, that judgment was affirmed. See 43 Wis., 319.

"After such affirmance, and after the record was remitted to the county court, defendant moved in that court to set aside and vacate the judgment, on the ground that the traverse of the affidavit on which the attachment had issued, had not been tried. This motion being denied, defendant then noticed the issue formed by the traverse of the affidavit for trial before the county court. Plaintiffs appeared and objected to the trial of such traverse, on the ground that it was too late to try the same after judgment rendered in the action. The objection was overruled, and plaintiffs excepted. The court then proceeded to try the traverse, and adjudged that the attachment be dismissed, assessed defendant's damages at \$50, taxed his costs on the trial of such traverse at \$39.52, and further adjudged that the amount of such damages and costs be set off against the judgment which plaintiffs had recovered against him. Plaintiffs then moved the court to vacate and set aside such judgment and order. The motion was denied, and plaintiffs duly excepted, and appealed from the judgment dismissing the attachment, and assessing such damages and costs, and directing the same to be set off against the judgment in their favor."

The cause was submitted on the brief of *G. W. Hazelton* for the appellants, and that of *J. J. Dick* for the respondent.

TAYLOR, J. The only question arising upon this record is, whether the respondent had the right, under the statute, to try the issue upon the traverse of the affidavit, after judgment had been rendered in the action and affirmed upon appeal to this court.

The proceedings upon a traverse of the affidavit upon which an attachment issues, is purely statutory, and the rights of the respondent must be determined by the statute. It is evident from the provisions of the statute, that it was intended

that the traverse should be tried before the issues in the action are tried; and there is nowhere in the statute applicable to this case, any provision authorizing a trial after judgment in the action. Sections 29-32, Tay. Stats., pp. 1475-6. These sections clearly contemplate but one judgment in the action, and that such judgment shall dispose of all the rights of the parties, as determined by the trial of the traverse, as well as of the issues in the action. Such result can only be attained by requiring the traverse to be tried before judgment is entered in the action; otherwise there would be a necessity for two judgments, as there were in fact in this case. But if there were any doubt as to the construction of the statute, this court has held, in *Main v. Bell*, 33 Wis., 544, and *Davidson v. Hackett*, 45 Wis., 208, that it was irregular to try the action until the issue upon the traverse had been first tried and disposed of; and in the case last cited the court below set aside the judgment for that reason, although the answer of the defendant admitted the cause of action upon which such judgment was rendered; and this court, upon appeal from the order setting the same aside, affirmed such order.

The logical conclusion to be drawn from these decisions is, that no trial of such traverse can be had after judgment in the action, so long as such judgment stands unreversed. The respondent's counsel evidently understood the force of the statute in that respect, and therefore made his motion to vacate the judgment in the action after the same had been affirmed by this court and the record remitted to the court below; but the court below refused his motion, and the judgment was permitted to stand. The judgment having been affirmed by this court, the order of the court refusing to set it aside was undoubtedly right.

It is too late for the respondent to allege that the judgment in the action was irregularly entered, after the same has been affirmed in this court upon appeal. If he desired to have the judgment set aside for the purpose of having a trial of his

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traverse, he should either have moved the court below to set the same aside for that reason, before he took his appeal to this court, or else, upon his appeal to this court, he should have asked a reversal upon that ground. Having done neither, he must be deemed to have waived his right to a trial of such traverse. Or, if he did not intend to waive his right, he has lost it by permitting the judgment to be obtained and stand unreversed against him.

This case cannot be governed by the Revised Statutes of 1878, as the rights of the parties had been fixed before this revision took effect. Had it been otherwise, the respondent would not have been entitled to try the traverse after judgment, under the provisions of section 2745, as the issue upon the traverse was made before the trial of the action.

The proceedings upon the trial of the traverse being irregular, the judgment appealed from must be reversed, with costs.

By the Court. — So ordered.

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SCHUMITSCH VS. THE AMERICAN INSURANCE CO. OF CHICAGO.

December 2 — December 16, 1879.

INSURANCE AGAINST FIRE: FORFEITURE. (1-4) *Misrepresentation as to incumbrances. (2) Notice of incumbrance. (3) Presumption as to validity of incumbrance. (5, 6) Change of title by mortgage of chattels, etc.*

1. Where the application for an insurance policy is made a part of the contract, and its statements warranties, the fact that at the time of the application there were incumbrances on the property to a much greater amount than was represented by the applicant, avoids the policy.
2. The applicant is chargeable with notice of an incumbrance which appears in his claim of title.
3. Where the applicant was in possession of the land under a bond for a deed when a mortgage of such land was executed by his vendor, the presumption is that the purchase money was not fully paid.
4. When a policy includes real property and also personal property situate therein, the risk being distributed, *it seems* that a misrepresentation as

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- to the realty, avoiding the insurance thereon, avoids the whole policy, the contract being entire. *Hinman v. Ins. Co.*, 36 Wis., 159.
5. Where a policy covering specific kinds of personal property in a building provides that it shall be avoided by any subsequent change of title of such property, and property of the kinds described is subsequently mortgaged and placed, with other property of like character, in the building (where, but for the mortgage, the risk would attach to it), and the assured *claims payment for the loss of such mortgaged property*, the subsequent mortgage avoids the policy. TAYLOR, J., dissents from this proposition.
6. The fact that the personal property for which a recovery is claimed, is so covered by mortgages that it is difficult to ascertain the interest of the assured therein, *held* an additional reason for giving full effect to the clause providing for a forfeiture.

· APPEAL from the Circuit Court for *Winnebago* County.

Action on a policy of insurance against fire. By direction of the court, defendant had a verdict; and plaintiff appealed from the judgment.

Elbridge Smith, for the appellant.

J. W. Lusk, for the respondent.

COLE, J. The court below was asked to direct a verdict for the defendant on several grounds, but upon what precise ground such direction was given does not appear in the case. It is not necessary to refer to these several grounds, as the second one alone is sufficient to sustain the direction of the court, even if there were no other obstacle in the way of a recovery upon the policy. The second ground upon which the direction was asked is, in substance, that the defendant was not liable for the loss because the undisputed testimony in the case showed that the real estate, when the insurance was effected, was incumbered for a much larger amount than was stated in the application or disclosed to the agent who solicited the risk. Among other questions asked in the printed application, which was signed by the plaintiff, was this: "Is your property incumbered? By what, and to what amount, and to whom?" *Ans.* "Mortgage of \$1,200." This was a

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representation of an existing fact in respect to the property insured, material to the risk, and, if false, avoided the policy. *Ryan v. The Springfield F. & M. Ins. Co.*, 46 Wis., 671. In the application; the plaintiff in effect agreed that the statements made by him in respect to the property should be deemed and taken to be promissory warranties. The policy itself also provides that the application shall be deemed and be a part of the contract, and constitute a warranty on the part of the assured. Now, to our minds the proof is very strong that the only incumbrance which was actually disclosed to the agent at the time the application was made, was the \$1,200 mortgage mentioned in the ninth answer. If this is so, then it is perfectly well settled, by the decisions of this and other courts, that the misrepresentation as to existing incumbrances avoided the policy; for it is admitted that there were at this time mortgages amounting to \$2,963, which were liens upon the real estate.

But it is said by plaintiff's counsel, that his client was an ignorant man, who could neither read nor write, and did not understand what was written in the application by the agent of the defendant; but that he fully informed such agent in regard to these incumbrances, and that it was the agent's fault that they were not mentioned in the application. The evidence upon this point is quite conflicting; and did the case turn upon the question whether or not the plaintiff informed the agent of these existing mortgages on the property, the case should have gone to the jury to determine how the fact was. But this is not all there is in regard to the incumbrances upon the real estate. There was the Kellogg \$10,000 mortgage, upon which, according to the stipulation, \$5,000 remained unpaid. Now, there is not the least scintilla of evidence, nor pretense even, that the plaintiff disclosed to the agent the existence of this incumbrance. The plaintiff says he did not know, until the day before he testified, that there was such a mortgage, and of course he said nothing about it

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to the agent at the time the application for insurance was made. But the mortgage was of record; the plaintiff was chargeable with notice of its existence, as it was in his chain of title. This mortgage was executed by Scott, the plaintiff's grantor, and placed upon record nearly two years before the plaintiff obtained his deed from Scott. This mortgage was executed January 25, 1869.

It appeared from the evidence that the mortgage embraced other valuable real estate besides the plaintiff's farm; but that fact does not affect the question nor aid the plaintiff's case; for he was bound by his contract to make a full disclosure as to that mortgage and all other incumbrances then existing upon the property. "The fact misrepresented was a most material one, bearing directly upon the degree of hazard involved in making the insurance. The hazard may well be regarded as greater when the interest of the insured is lessened by incumbrances on his title." *Cooper v. The Farmers' Fire Ins. Co.*, 50 Pa. St., 299; *Ryan v. Ins. Co.*, *supra*; *Davenport v. New England M. F. Ins. Co.*, 6 Cush., 340; *Hayward v. Same*, 10 Cush., 444; *Wilber v. Bowditch M. F. Ins. Co.*, 10 Cush., 446; *Towne v. Fitchburg M. Ins. Co.*, 7 Allen, 51.

It also appeared from the evidence that the plaintiff purchased his farm of Scott in 1863, took a bond for a deed, went at once into possession of the premises, and has always lived upon them. A question was suggested, whether, under these circumstances, the Kellogg mortgage was really an incumbrance upon the property. There was nothing to warrant the inference that it was not. No reasonable presumption can be made, in the absence of all proof upon the subject, that the entire purchase money had been paid when Scott gave the Kellogg mortgage, and that the plaintiff was the real owner. Manifestly, to the extent of the mortgagor's interest in the property for the unpaid purchase money, the mortgage became a valid lien. The plaintiff did not obtain his deed from Scott

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until December 1, 1870. Presumably, therefore, the Kellogg mortgage was an incumbrance.

The policy in this case covered a dwelling house, furniture, etc., two barns, and the grain, hay, live stock and farming utensils, etc., in them. The action is for the loss sustained by the burning of the barns and contents. The policy being avoided on account of misrepresentations as to existing incumbrances, within the doctrine of *Hinman v. The Hartford Fire Ins. Co.*, 36 Wis., 159, there can be no recovery for the loss of the barn or contents. In the *Hinman* case the policy covered a building and certain personal property therein. The risk was distributed, as in this case: so much upon the building, and so much upon the personal property. There was a misrepresentation in regard to the title and ownership of the real estate. It was held that this avoided the entire policy. The reason given is, that the contract of insurance is entire, and the insurer has the right to know what the interest of the insured in the property is, and to have disclosed all material facts affecting the risk; for the risk is assumed upon the express condition that these facts have been accurately and truly stated in the application. See *Lovejoy v. Augusta M. Fire Ins. Co.*, 45 Maine, 472; *Day v. Charter Oak F. and M. Ins. Co.*, 51 Maine, 91. But, as we understand the testimony, there is an additional obstacle in the way of recovering for the loss of the personal property in the barns. There were at least one, if not two, chattel mortgages given on some portion of the personal property after the policy was issued. The policy provided that if the property insured should be sold or transferred, or any change should take place in the title without the consent of the company, this should avoid the policy. Now, upon this point we are disposed to hold this rule: Where a policy is issued which covers personal property, such as hay, grain, live stock, farming utensils, etc., in a building, and any property of that description is subsequently mortgaged and placed in the building where the risk

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will attach to it under the general language used, and the insured claims payment for the loss of such mortgaged property as being covered by the policy, there the subsequent chattel mortgage should be deemed a breach of the condition of the policy. If the insured should place subsequently mortgaged property in a building, not claiming that it was covered by the policy, and other personal property in the building should be destroyed which was covered by the policy, the insurance upon the unincumbered property might not be affected by the fact that mortgaged property was in the building at the same time, and destroyed with it; but the rule would be otherwise if the insured claimed that the mortgaged property was covered by the policy, and that he was entitled to be paid for its loss. The personal property was so covered by mortgages that it is difficult to determine the plaintiff's interest therein. This furnishes an additional reason for giving full effect to the above cited clause in the policy. Therefore, upon this ground as well as upon the one first noticed, we think that there could be no recovery in this case, and that the direction of the circuit court to find for the defendant was correct.

The judgment of the circuit court must be affirmed.

TAYLOR, J. I assent to the opinion of the court that the judgment of the circuit court should be affirmed, but dissent from that part of the opinion which holds that the giving of a chattel mortgage by the assured upon any part of his personal property, after the date of the policy, without giving notice thereof to the company, and his making claim, after the loss, that such personal property so mortgaged was covered by the policy, vitiates the policy as to all the property insured thereby.

By the Court. — Judgment affirmed.

 Kemp and another vs. Hein and others.

KEMP and another vs. HEIN and others.

December 2 — December 16, 1879.

PARTITION. (1) *When partition sale should be vacated.* (2) *Appeal in partition: Practice: Parties: Waiver.*

1. A sale was made in partition in the absence of many of the parties in interest, and other persons, who were kept away by a reasonable expectation that the proceedings would be stayed; and it was for a very inadequate price, much less than one of such absent parties would have bid, and little more than half what the purchaser bid a few days before, when his offer was not accepted by reason of a stay; and the proceedings were conducted hastily, with knowledge that an appeal had been taken, and that a further stay pending the appeal would soon be made. *Held*, that the court erred in refusing to vacate the sale.
2. Parties to a partition suit, whether made plaintiffs or defendants thereto, may appeal from an order by which they are aggrieved, and make the other parties to the suit, whether plaintiffs or defendants, respondents to the appeal; and any irregularity in respect to parties in such appeal, is waived by the appearance of the respondents by attorney at the hearing, without motion to dismiss for such irregularity.

APPEAL from the Circuit Court for Ozaukee County.

The case is stated in the opinion.

For the plaintiffs, who were also appellants, there were briefs by *Eugene S. Turner*, with *Wm. J. Turner*, of counsel, and oral argument by *Eugene S. Turner*.

The cause was submitted for the respondent on the brief of *Geo. W. Foster*.

ORTON, J. This is an appeal from the order confirming the sale which resulted from proceedings in partition, in which these parties were jointly interested in the premises adjudged to be sold. The parties to this appeal were all parties to the proceedings in partition, either as petitioners or defendants (and it makes no difference which), and were interested in the premises, and the appellants resisted the motion to confirm the sale, and have made here the other parties respondents;

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and in this there appears no irregularity. But, if any irregularity in respect to parties exists, objection on such ground is waived by the appearance of the respondents by attorney on the hearing, without motion to dismiss by reason of improper, or want of, parties. Any party aggrieved by any judgment or order of the circuit court, may appeal to this court. Section 2, ch. 264, Laws of 1860.

The facts in relation to the sale appear substantially as follows: It was first advertised to take place on the first day of December, 1877; and on that day the premises were offered at public auction by the sheriff, and the respondent *Andreas Hein* bid for the same the sum of \$3,200. A stay of proceedings had been obtained for the purpose of preparing for an appeal to this court from the judgment in partition, and thereupon, and pending said bid, the sale was postponed until 10 o'clock A. M. on the fourth day of December. Before that time had arrived, an appeal had been taken, and notice thereof served upon the attorney of the plaintiffs in the partition suit, and especially the attorney of the respondent *Andreas Hein*; and said attorney had informed the said *Hein* thereof; but no notice of the filing of an undertaking to stay proceedings had been served, although such undertaking was filed on said fourth day of December, but whether before or after the hour of 10 o'clock does not appear.

In consequence of such appeal, the appellants and other persons did not attend at the place and hour of sale, supposing that no sale would take place by reason of such appeal; but the said respondent *Andreas Hein*, his brother Joseph Hein, and the said attorney, together with the sheriff, repaired to the court-house, the place of sale, and about the exact time, if not before the exact time so fixed for the sale; and, there being no other persons or bidders present, the sheriff again offered the premises, and the said attorney bid for the same the sum of \$1,700 for the said *Andreas Hein*, and they were at once

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struck off to the said *Hein* for that amount, it being the only bid made.

Both the said *Andreas Hein*, the purchaser, and his attorney state in their affidavits that the reason why the bid was only the sum of \$1,700 was, that an appeal had been taken which would involve litigation and expense. According to the affidavit of the attorney of the appellants, the whole time occupied in the sale was from six to ten minutes, and the sale was made before the hour of ten o'clock; and the affidavits of the respondent *Hein* and his said attorney do not agree, and are very indefinite, as to the time. It further appears that the said appellant *Nicholas Kemp*, had he supposed the sale would take place and could properly be made, would have bid the sum of \$3,200 for the premises, and in case of a resale he offers to bid for the same the sum of \$2,500; and that the premises are worth from \$3,200 to \$5,000.

We think the circuit court should have refused to confirm this sale, not by reason of any particular irregularities, but because all of the proceedings and circumstances taken together most conclusively show that it was very unfair and unconscionable, if not absolutely fraudulent. Both *Andreas Hein* and his attorney knew that an appeal had been taken, and that a stay of proceedings would very soon be made; and the said attorney, according to the affidavit of the sheriff, directed the sale to take place, and he was the bidder for and in the presence of his client, and the sale was evidently *hurried*, in the absence of other bidders and other parties interested, in anticipation of a stay of proceedings. The bid of \$3,200, although never formally withdrawn, was not renewed but a bid of a little more than half of that amount only was made.

Without further particularizing, it is sufficient to say, in view of the whole transaction, that a public official sale of valuable property, to one of the parties interested, for so in-

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adequate a sum, and in the absence of other parties interested, caused by a very reasonable supposition that it would not take place under the circumstances, and so suspiciously hurried to a consummation, cannot stand a moment in a court of equity.

The principles upon which such a sale should be set aside are clearly established by numerous decisions of this court. In *Strong v. Catton*, 1 Wis., 471, a party interested in the property sold, and who intended to redeem it before sale, remained away from the sale, under a reasonable belief and supposition that the sale would be postponed, and the property was sold for an inadequate price. The sale was set aside, and this court, in the opinion of the late Mr. Justice CRAWFORD, quotes approvingly the language in *Morice v. The Bishop of Durham*, 11 Ves., 57: "Where there is some fraud or misconduct in the purchaser, or fraudulent negligence in another person as agent, of which it is against conscience that the purchaser should take advantage, the biddings will be opened after confirmation;" and, as the result of a review of the New York authorities upon the question, the opinion says, "that whenever it would be inequitable or against good conscience to permit the sale to stand, the court will not hesitate to exercise its discretion by ordering a resale," and further, "in no proper sense of the word could a transaction of this kind be called a fair sale."

In *Adams v. Haskell*, 10 Wis., 123, the parties interested, and who intended to bid, and would have bid \$500 for the property, were kept away by an accident, and the plaintiff in foreclosure bid it in for \$150. The circuit court on motion set aside the sale, and this court affirmed the order as being "a very sound exercise of discretion under the circumstances."

In *Cleveland v. Southard, Safford et al.*, 25 Wis., 479, the purchaser at foreclosure sale colluded with the mortgagee in order to buy the mortgaged premises for very much less than the mortgage debt and their value; and this court, in the opinion of the late Mr. Justice PAINE, said: "After collusively

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selling the land to Safford on the foreclosure, for a part only of the debt, when he knew, if fairly sold, it would have much more than paid the whole of it, he ought not to be allowed to enforce the personal claim for the deficiency which he had himself thus caused, against Southard;" and the motion to set aside the sale was denied, because of this clear and adequate remedy in defense to a suit for the deficiency. If a party for such an act is to be held responsible by collusion with the purchaser, much more where he is the party himself, and the rights of no third person intervene. See, also, *Babcock v. Perry*, 8 Wis., 277; *Starkweather v. Hawes*, 10 Wis., 125; *Campbell v. Smith*, 9 Wis., 305; *Jones v. Dow*, 15 Wis., 582; *Baasen v. Eilers*, 11 Wis., 277; *Encking v. Simmons*, 28 Wis., 272; *Warren v. Foreman*, 19 Wis., 35.

By the Court. — The order of the circuit court confirming the sale is reversed, with costs, and the cause remanded with directions to that court to set aside the sale of the premises to the respondent *Andreas Hein*, made on the fourth day of December, 1877.

48	36
74	98
48	36
80	396
48	36
92	51
48	36
94	121

THE AMERICAN INSURANCE COMPANY VS. GALLATIN and another.

December 2 — December 16, 1879.

INSURANCE AGAINST FIRE. *Waiver or estoppel by act of agent.*

1. Fire insurance policy, with condition that it should be avoided by additional insurance taken without consent of the secretary of the insurance company indorsed. The application was made to L. and K., local agents of the company, who were mere surveying agents; and was forwarded by them to the company, which sent the policy to the insured from its principal office. Afterwards L. and K. dissolved partnership, but both continued to act as agents for the company, L. becoming a "recording agent," with power to issue policies, etc., and K. continuing to be a mere surveying agent. Subsequently the assured applied to L. for further insurance on the same property, and was referred by him to K.

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- He then applied to K., who sent him to agents for other insurance companies, and these issued to him another policy on the property in another company, and soon after informed K. of the fact, who, with knowledge of the prior policy, took no objection; and the assured was not notified by any person that such additional insurance rendered his former policy invalid. No consent of the secretary was indorsed on the first policy. *Held*, that for a loss occurring after these transactions, a recovery could be had upon such first policy; L. having so acted that the assured had a right to believe that he consented to the further assurance, and the company being bound by L.'s acts as a waiver or estoppel.
2. The mere fact that an application to an agent for insurance is forwarded by him to the company's principal office for approval, is not sufficient to charge the assured with notice of the exact nature and limits of the agent's authority; and, in the absence of other proof that the assured here had notice that K. was only a surveying agent, K.'s consent to the further assurance also binds the company, by way of waiver or estoppel.
 3. This cause is decided (as was *Fleming v. Ins. Co.*, 42 Wis., 616) without reference to sec. 1, ch. 13, Laws of 1871, the construction of which is not determined.
- RYAN, C. J., dissented from the judgment.

ERROR to the Circuit Court for Winnebago County.

The action below was on a policy of insurance against loss by fire, issued by the defendant company to the plaintiff *Gallatin*, on his dwelling-house in the city of Oshkosh, and household furniture and wearing apparel therein. In case of loss, a portion of the insurance money was payable to the plaintiff *Kuettle* by the terms of the policy. The property was destroyed by fire during the term for which the policy was issued.

A few weeks preceding the fire, *Gallatin* procured other insurance on the same property in another company, and no consent thereto of the secretary of the defendant company was written on the policy in suit. The only defense made to the action is, that the policy was thereby rendered void.

The condition in the policy on which the defense is founded, is as follows: "If the assured shall have obtained, or shall hereafter obtain, any other insurance on the property hereby insured, or on any part thereof, without the consent of the

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secretary of this company written hereon, then the policy shall be void."

After the testimony had all been given, the circuit judge directed the jury to find for the plaintiffs, and to assess their damages at \$373.32. A verdict was thereupon returned as directed. It is conceded that, if the plaintiffs are entitled to recover, the damages are assessed at the sum due on the policy.

The testimony is sufficiently stated in the opinion. The circuit court denied the defendant's motion for a new trial, and judgment was entered pursuant to the verdict; and the defendant company brought the case to this court by writ of error.

The cause was submitted on the brief of *Charles W. Felker* for the plaintiff in error, and that of *Weisbrod & Harshav* for the defendants in error.

The argument for the plaintiff in error was substantially as follows: 1. The company never consented to the procurement of additional insurance, and never even had any notice or knowledge of the fact until after the loss. The recording agent, Lawson, through whom alone the company could be charged (in the absence of any act done by, or communication had with, the general officers of the company), testified that he never consented to further insurance or had any notice or knowledge thereof before the fire. When *Gallatin* applied to him for insurance in the fall of 1876, and again just before the fire, he did not give his consent. He referred him to King, for an obvious reason. Lawson being then a recording agent, his consent would have bound the company; while if King took the application for additional insurance, he must necessarily submit it to the company, which could accept or refuse, relieving Lawson of responsibility. But such a reference to a mere soliciting agent had nothing of the nature of a consent by Lawson to grant the additional insurance; nor could the making of such an application to him be any notice of the insurance afterwards taken in another company.

2. Suitors will not be permitted to plead ignorance of the law that an agent can bind his principal only within the scope of his authority, and that whoever deals with a special agent, constituted for a special purpose, deals at his peril, and is bound to know the extent of his authority. The existence of soliciting agents as a distinct class of insurance agents, with special and limited powers, is as well known as almost any other usage of business. In the first transaction which *Gallatin* had with *King*, the latter solicited the insurance, wrote up the application, and gave *Gallatin* a receipt signed by *King & Lawson* in these words: "Received of *Fred. Gallatin* an application for insurance by the *American Insurance Company*, of Chicago, Illinois, on property to the amount of \$350, for the term of five years, *subject to the approval of said company*; also an installment note for the payment of premium, as represented on the back of this receipt; also \$2.80, first installment." On the back of this receipt was a statement that \$2.80 would be due on a specified day of each year; that a printed notice would be forwarded to the assured before each such installment fell due; and that he could transmit the amount as therein directed, at the risk of the company. The receipts for the second and third installments (dated in September, 1875 and 1876, respectively, and being for the only installments paid after the first), were dated at the office in Chicago, and signed by the secretary of the company; and, in the absence of any evidence to the contrary, it must be presumed that the installments were paid directly to the company. These transactions clearly charged *Gallatin* with notice of *King's* limited and special authority as a mere soliciting agent (*Wood on Fire Ins.*, 652; 2 *Kent*, 621; *Dunlap's Paley*, 202; *Story on Agency*, § 133; *May on Ins.*, § 138); and so far as the claim that the condition of the policy as to additional insurance was waived is based on any act of *King*, they bring the case clearly within the decision in *Fleming v. Hartford Ins. Co.*, 42 *Wis.*, 616. If *King* had no power to

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bind his principal by contract, he could have no power to waive any conditions of an executed contract. It cannot be seriously questioned that if *Gallatin* dealt with King with knowledge that he was exceeding his authority, the company were not bound; and if the question had been submitted to the jury, they must have found the existence of such knowledge. *Mitchell v. Lycoming Ins. Co.*, 51 Pa. St., 402; *Ins. Co. v. Johnson*, 23 id., 72; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill., 516; *Healey v. Imperial Ins. Co.*, 5 Nev., 268; 13 Gray, 79; 6 id., 169; 8 id., 32; *Markey v. Mut. Ben. Ins. Co.*, 103 Mass., 78; *Catoir v. Am. Life Ins. and Trust Co.*, 33 N. J. Law, 487; *Schenck v. Mercer Co. Mut. Fire Ins. Co.*, 24 id., 447; *Barrett v. Union Mut. F. I. Co.*, 7 Cush., 175; *Forbes v. Agawam Mut. F. I. Co.*, 9 id., 470; 24 Mich., 268; *Keenan v. Dubuque Mutual F. I. Co.*, 13 Iowa, 375; *Ayres v. Hartf. F. I. Co.*, 17 id., 176; 25 id., 50; 2 Denio, 65; 18 N. Y., 387; 66 id., 464; 20 id., 52; *Wilson v. Genesee Mut. Ins. Co.*; 14 id., 418; *Bush v. Westchester F. I. Co.*, 63 id., 531. There is indeed a conflict of authority upon the question of the extent to which insurance companies are bound by the acts of their soliciting agents down to the time of the final execution of the contract by the *delivery of the policy*; and it is here conceded that such companies should be bound by all that such an agent does, or knows concerning the risk, down to that time, since that is within the scope of his duties. *Mitchell v. Ins. Co.*, *supra*; *Rowley v. Empire Ins. Co.*, 3 Keyes, 559; *Anson v. Winneshiek Ins. Co.*, 23 Iowa, 84; *Miller v. Mut. Ben. Life Ins. Co.*, 31 id., 216; *Franklin Life Ins. Co. v. Sefton*, 53 Ind., 380. But here the conflict of authority ceases. When the soliciting agent has fulfilled his mission and exhausted his powers, by procuring a delivery to the applicant of a policy of insurance, courts cannot enlarge and extend his powers by giving him authority thereafter to change the conditions of the policy, and bind the company, un-

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til the loss be paid. But this the circuit court attempted to do by its direction to the jury to find for the plaintiff below.

For the defendants in error, it was argued as follows:

1. It is settled in this state that an insurance agent authorized to issue policies and receive premiums may bind the company by a waiver of any condition of the policy. *Warner v. Ins. Co.*, 14 Wis., 318; *Miner v. Ins. Co.*, 27 id., 693; *Roberts v. Ins. Co.*, 41 id., 321; *Gans v. Ins. Co.*, 43 id., 108; *Winans v. Ins. Co.*, 38 id., 342. The only case in this state which makes a distinction between soliciting or surveying agents and recording agents, is *Fleming v. Hartford Ins. Co.*, 42 Wis., 616; and in that case the court held that the plaintiff could not recover, on the ground that he *had notice* that the agent had no authority to make a contract of insurance. Many authorities in other states hold that a mere soliciting agent can neither make a contract of insurance nor waive any condition of the policy, *provided* that either actual or constructive notice of his limited authority is brought home to the assured. In all these cases it was shown that the assured had either direct notice of the agent's limited authority or knowledge of such facts as a prudent man was bound to regard. Secret limitations by the company upon the agent's *apparent* authority are not sufficient; but the assured must have notice of such limitations. *Wood on Fire Ins.*, §§ 283, 390. In the present case it does not appear that *Gallatin* had any knowledge or notice, at the time the original policy was issued, that King & Lawson had no authority to issue policies; but the company itself led him astray by indorsing on the policy, "King & Lawson, Agents," instead of describing them simply as "Soliciting Agents." These men kept a regular office or place of business, kept a register of all policies issued by this company, sometimes collected premiums, and in fact transacted a general insurance business; and *Gallatin* had no reason to question their authority as recording agents. Nor, when he applied for and obtained additional insurance, had he

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any notice, direct or indirect, of the limited authority of King; but he exercised due diligence, and was led by the fraudulent acts of Lawson to believe that King had full authority to grant such insurance. In referring him to King, Lawson must be held to have consented that he should take the additional insurance if King procured it for him; he impliedly authorized King to procure for *Gallatin* such further insurance. And the company is responsible for the acts of its "agent's clerks, or any person to whom he delegates authority to discharge his functions for him." Wood on F. I., § 409. Moreover, the company is estopped by the fraudulent acts of Lawson from denying that it had notice of the additional insurance. Again, King, as soliciting agent, was to receive applications for additional insurance, and transmit them to the company; and this being in the line of his duty, it must be conclusively presumed that he notified the company of *Gallatin's* application. Both through Lawson and through King, therefore, the company is chargeable in law with notice of the additional insurance; and, having failed to return the premium note or notify *Gallatin* that the policy was cancelled, it cannot now defend on the ground of such additional insurance. Wood, § 371, and cases there cited.

[Counsel on both sides also discussed at length the question whether sec. 1, ch. 13 of 1871, and sec. 1977, R. S., render insurance companies doing business in this state liable for the acts of soliciting agents to the same extent as for those of recording agents.]

Lyon, J. No consent of the secretary of the insurance company that *Gallatin* might procure other insurance on the insured property, is written on the policy. It is manifest, therefore, that, by the terms of the contract between the parties, the policy in suit is void, unless the company or its agent has done some act, or is chargeable with some omission of duty, which operates as a waiver, or which estops the com-

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pany from availing itself of the stipulation that the policy shall be void in case further insurance of the property be obtained without such consent written thereon.

Inasmuch as the judge directed a verdict for the plaintiffs, the judgment cannot be upheld unless the facts constituting such waiver or estoppel are conclusively proved.

As we read the testimony, the undisputed facts proved on the trial are as follows: The policy in suit was issued to *Gallatin* in 1874, and the insurance was for five years. The application for the policy was made to King & Lawson, the local agents of the company. The powers of these agents were limited, by their appointment, to receiving applications for insurance and collecting premiums therefor. That is to say, they were surveying agents only. *Fleming v. Ins. Co.*, 42 Wis., 616. The policy was forwarded to *Gallatin* from the office of the company in Chicago, indorsed at such office, "King & Lawson, Agents."

In 1875, King & Lawson dissolved their copartnership, but both continued to act as agents for the company. King remained a surveying agent; but in May, 1876, Lawson was appointed a recording agent of the company; that is, he was invested by the company with power to make contracts of insurance, and countersign, issue and renew policies on behalf of the company, as well as to receive applications and collect premiums. *Fleming v. Ins. Co.*, *supra*. It does not appear that *Gallatin* had any notice of the character of the agency of King & Lawson, further than it might have been disclosed inferentially by the manner in which they conducted the business. Lawson testified that he was not a recording agent of the company in respect to a class of policies denominated "installment policies;" that his commission does not apply to such policies. The policy in suit is one of this class. But the witness produced his written appointment or commission as agent, and no distinction is made therein between installment and other policies. The power therein conferred is gen-

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eral. It may be observed here that the writing is the best evidence, and destroys the force of the conflicting oral testimony.

In the fall of 1876, *Gallatin* applied to Lawson for further insurance on the insured property, and the latter referred him to King. It does not appear that he then applied to King. Early in 1877, and a few weeks before the fire, *Gallatin* again applied to Lawson for further insurance on the property, and was again referred by him to King. Lawson testifies that he referred *Gallatin* to King because he thought there was already enough insurance on the property; but it does not appear that he told *Gallatin* so.

It satisfactorily appears that *Gallatin* thereupon applied to King for the additional insurance, and King sent him to Bennett & Pulling, who were agents at Oshkosh for other insurance companies, and they issued another policy to *Gallatin* on the insured property, in behalf of the "Millville Insurance Company." This policy was issued February 16, 1877.

King occupied the same office with Bennett & Pulling, and had there a copy of Lawson's register of the business of the defendant company — the American, — which contained an entry of the policy in suit. Mr. Pulling, who transacted the business with *Gallatin*, examined the register and saw this entry when he issued the Millville policy.

Within three or four days thereafter, Pulling informed King that he had issued such policy. Pulling's testimony on the subject (which is uncontradicted) is as follows:

"The record that I examined in the *American Insurance Company's* books was the record of this policy; it was not a full copy of it; it was a sort of an abstract. I told Mr. King that I had issued additional insurance on the property; he said nothing; he merely glanced at the register, and sat down and said nothing about it; he glanced at the Millville register. He asked if I had seen a man he had sent there; this was at the time I told him about the policy; I told him I had written it

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up in the Millville, and pointed to the register. The whole conversation about the matter was this: he asked, when he came in, if I had seen a man (I think he mentioned the name) that he had sent there for additional insurance; I said, yes, and I said that I had written it up in the Millville, and pointed to the register that lay on the desk; he merely glanced at it, and nodded and sat down. I wouldn't be certain that he mentioned any names."

Gallatin was not notified by any person that the policy in suit was rendered invalid by the additional insurance, although he and the agents of the defendant company, King & Lawson, all resided in Oshkosh until after the fire. The insured property was burned March 25, 1877. King died in the fall of that year.

From the foregoing facts, the inference seems very plain, that *Gallatin* believed, and had the right to believe, that Lawson consented to the further insurance. If Lawson was of the opinion that the property was already fully insured, it was his plain duty to express that opinion to *Gallatin*. He did not do so, but so dealt with *Gallatin* that the latter evidently thought he had his consent, and on the faith thereof incurred the trouble and expense of obtaining the Millville policy. Nor is this all. King, the agent of the defendant company, to whom Lawson referred *Gallatin*, evidently consented to the further insurance; certainly he assented to it soon after it was obtained.

It is argued that the company is not bound by these acts of King, because he had no power to make contracts for it. We are inclined to think that there is nothing in the evidence tending to show that *Gallatin* had notice that King was only a surveying agent. The fact, standing alone, that the application for the insurance was forwarded to the office of the company for approval, to the knowledge of *Gallatin*, is not such evidence. Although that course *must* be pursued by a mere surveying agent, it *may* be pursued by a recording agent;

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and it would be unreasonable to charge the insured with notice of the precise character and limits of the agent's authority, merely because he knew that the agent thus forwarded the application for approval.

We conclude, therefore, that, *quoad* the insured, both Lawson and King must be regarded as general agents of the defendant company; that is, as agents having power to contract for the company. So regarding them, their consent, or the consent of either of them, to further insurance, is binding upon the company, and operates as a waiver of the stipulation in the policy concerning the manner in which consent to further insurance should be given.

On the same grounds, acts *in pais* of either agent, which would estop the agent were he the principal, will in like manner estop their principal—the insurance company—from claiming a forfeiture of the policy under the stipulation.

Had Lawson *expressly* consented to the further insurance, it is conceded that such consent would bind the company and operate as a waiver of the stipulation. Why should not the company also be bound by the consent which may fairly be implied from the manner in which he treated the application of *Gallatin* for further insurance? And why is not consent thus given, which *Gallatin* accepted as consent, and acted upon in good faith, equivalent to express consent? No good reason is perceived why the company is not equally bound in either case. But if the acts of Lawson in the premises do not amount to a waiver, we think they raise an estoppel against the company. Had *Gallatin* applied at the office of the company in Chicago for further insurance, or for leave to obtain it, and had the general officers of the company in charge of its business there referred him to King, their agent, without expressly assenting to or dissenting from the application, and had King consented to further insurance, and directed the insured where to obtain it, making no objection when notified that he had obtained it, no court would hesitate

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for a moment to hold that the company was estopped to claim a forfeiture of the policy because the consent of its secretary was not indorsed upon it.

In this transaction Lawson represents the company, and the same results must follow his acts and omissions as would follow the same acts and omissions of its president, secretary, or board of directors.

As regards the acts of King, we are satisfied that he expressly consented to the further insurance, and thereby waived the necessity for obtaining the written consent of the secretary. The grounds upon which we are inclined to hold his consent binding upon the company have already been stated. Holding, however, that the company is bound by the acts and omissions of Lawson, it would not change our judgment were we to hold the opposite views in respect to the acts of King.

Our conclusion is, that the evidence shows conclusively that the plaintiffs were entitled to recover, and hence, that the court properly directed a verdict for them.

The rules of law upon which our judgment is based, have been applied by this court in many cases, some of which will be found cited in the brief of counsel for the defendants in error.

We have determined the appeal without reference to chapter 13, Laws of 1871, sec. 1, which provides that a person performing certain acts in respect to an insurance company "shall be held to be an agent of such company to all intents and purposes." An argument has been based upon this statute to show that one who, before the act, was a mere surveying agent, becomes by the act, as to the public, a general agent; that such is the construction to be given the phrase "to all intents and purposes;" and that under the statute the acts of King would bind the company as effectually as would those of Lawson, or any other recording agent.

On the other hand, it is argued that the purpose of the

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statute is to make agents like King amenable, as agents of the companies, to the requirements of the insurance laws of the state, and not to extend the liability of the companies for the acts or omissions of their soliciting or surveying agents. See, also, R. S., sec. 1977.

We do not on this appeal determine the construction of the statute. Allusion is here made to it mainly for the purpose of saying that in the case of *Fleming v. Ins. Co.*, 42 Wis., 616, our attention was not called to it, and it was not considered. It may be that a construction might properly have been given to the statute in that case; but none was given, and the question as to what is the true construction thereof must be considered open for future argument and adjudication.

By the Court.—The judgment of the circuit court is affirmed.

RYAN, C. J., dissented.

KOPLITZ VS. GUSTAVUS.

December 2 — December 16, 1879.

LANDLORD AND TENANT. *Tenancy from year to year, how created.*

K. attempted orally to lease premises to G. for two years at a specified sum per year, payable "at such times during the term as plaintiff should require;" and G. went into possession under the lease, and remained in possession twenty months, paying the first year the specified rent therefor when demanded, and also paying at the same rate until the end of the next six months. *Held*, that though the lease was void by the statute of frauds, G. became a *tenant from year to year on the terms* therein stipulated.

APPEAL from the County Court of Winnebago County.

Action for rent; tried by the court without a jury. The findings of the court bearing upon the character of the tenancy are recited in the opinion. There was a further finding

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that there was due from defendant to plaintiff \$49.50, as rent of the premises for the months of April, May and June, 1877, payment of which had been refused; and from a judgment in plaintiff's favor for that sum, defendant appealed.

The cause was submitted on the brief of *Weisbrod & Harshaw* for the appellant, and that of *W. B. Felker* for the respondent.

For the appellant it was argued, that, as the lease was not in writing, and was for a period longer than a year, it was void (R. S., sec. 2304); that the rent reserved was not annual but monthly, payable at the end of each month on plaintiff's demand; and that under these circumstances the tenancy created by holding over was one from month to month, and determinable by thirty days' notice (*People v. Darling*, 47 N. Y., 666; *Anderson v. Prindle*, 23 Wend., 616; 1 Washb. R. P., 4th ed., 601); that defendant had given a month's notice to quit, and the objection that this notice was not in writing was waived by plaintiff's failing to object to it upon that ground and insisting upon a full year's rent; and that if this were otherwise, the evidence showed that in June, 1877, there was either an eviction of the defendant or a surrender by operation of law, and a tender by defendant of the full rent due to that time.

For the respondent it was argued, that, "if any tenant for a year or more shall hold over after the expiration of his term, he may, at the election of his landlord, be considered as a tenant from year to year upon the terms of the original lease." Sec. 2, ch. 91, R. S. 1858; sec. 2187, R. S. 1878. The statute is silent as to the time and manner of the election. But a tenant for a year holding over does so at his peril; and the landlord may treat him either as a trespasser or as a tenant for another year on the terms of the prior lease. *Conway v. Starkweather*, 1 Denio, 113; *Hunter v. Osterhoudt*, 11 Barb., 33; *Witt v. Mayor of N. Y.*, 5 Rob., 248; *Park v. Castle*, 19 How. Pr., 29; *Schuyler v. Smith*, 51 N. Y., 309; *Bacon v.*

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Brown, 9 Conn., 334; *Hemphill v. Flynn*, 2 Pa. St., 144. As an agreement to terminate a lease need not be express, but may be inferred from the conduct of the parties (30 N. Y., 454; 14 Allen, 177; 2 Duer, 183; 73 Ill., 51), so the election to continue the tenancy for another year may be indicated by the acts of the parties, without express notice of an election; and any act which would estop the landlord to deny a yearly tenancy, ought to be sufficient in law to bind the tenant with notice of the landlord's election.

A parol lease of land for years being void, the tenancy, if continued beyond a year, becomes a tenancy from year to year. 23 Conn., 304; 21 id., 398; 12 How. Pr., 259; 6 id., 564; 2 Cow., 660; 8 id., 226; 4 Wend., 327; 31 N. Y., 514; 35 Pa. St., 45; 4 Whart., 226; *Jones v. Peterman*, 3 S. & R., 543; 13 id., 60; 3 Ohio, 294; 7 Ohio St., 165; 18 Ill., 75; *Berrey v. Lindley*, 42 E. C. L., 263; *Mann v. Lovejoy*, 21 id., 454; *De Medina v. Polson*, 3 id., 21; *Hamerton v. Stead*, 10 id., 159; *Clayton v. Blakey*, 8 Term, 3; *Martin v. Watts*, 2 Esp., 501. Payment of rent in monthly or quarterly installments is not inconsistent with a yearly tenancy. *McKinney v. Peck*, 28 Ill., 178; *Laguerenne v. Dougherty*, 38 Pa. St., 45; *Schuyler v. Leggett*, 2 Cow., 660.

COLE, J. It seems to us impossible to deny that there was abundant testimony in this case to sustain the finding of the county court to the effect that the defendant, on the first of October, 1875, by a verbal lease, rented of the plaintiff the premises in question, for two years from that date, at the annual rental of \$198 per year, or at the rate of \$16.50 per month, the rent to be paid at such times during the term as the plaintiff should demand; that the defendant went into possession of the premises, under the lease, about that time, and remained in possession for the first year, paying \$198 rent, when it was demanded by the plaintiff; and that the defendant continued to possess and occupy the premises down to the

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27th of May, 1877, paying the rent for the second year down to and including the month of March.

Certainly the weight of testimony tends to establish these facts, and the question is, Was the county court right in its conclusion of law, deduced from them, that the lease was valid for the term of one year from the date thereof, and that after the expiration of the year the defendant was a tenant holding over from year to year? On the part of the defendant it is claimed that this view is incorrect, his counsel insisting that the lease, not being in writing, was void, and that the defendant had the right, without the consent of his landlord, to abandon the premises at any time during the second year, and thereby exonerate himself from the payment of rent during the residue of that year. This position of counsel is based on the provisions of the statute of frauds which were in force when the verbal lease was made, and which declare, in substance, that no estate or interest in land, other than leases for a term not exceeding one year, shall be created or granted unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating or granting the same, or by his lawful agent duly authorized thereunto (section 6, ch. 106, 2 Tay. Stats.), and that every parol contract for a leasing for a longer period than one year shall be void (section 8).

It will be observed that these provisions in regard to parol leases differ somewhat from the terms of the English statute of frauds, and from the statute as adopted in some of our sister states, which do not make verbal leases exceeding the prescribed period void, but allow them the effect of estates at will. *Bolton v. Tomlin*, 5 A. & E., 856; *Ellis v. Paige*, 1 Pick., 43; *Davis v. Thompson*, 13 Maine, 214; *Barlow v. Wainwright*, 22 Vt., 88; Taylor's L. & T., §§ 28 et seq; 1 Washb. R. P. (4th ed.), 613, 614; Browne on Frauds, ch. 3; *Doe v. Bell* and *Clayton v. Blakey*, 2 Smith's Leading Cases, 177, 180. But the counsel does not contend even for such a literal and rigid construction of the above provisions of our statute as would

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make this parol lease for two years absolutely void — more especially when coupled with the facts of the lessee's entry under it, his holding possession of the premises for about a year and eight months, and his payment of the stipulated rent for a year and a half; but he says that these facts cannot have the effect of changing the tenancy into one from year to year, as was held by the county court. But to this it may be answered, that there are well considered cases which decide, under the English statute and statutes which contain similar provisions, that while a parol lease for more than the prescribed period creates in the first instance only an estate at will, yet such estate, when once created, may, like any other estate at will, be converted into a tenancy from year to year, by payment of rent or other circumstances which indicate an intention to create such yearly tenancy. See the authorities cited in *Barlow v. Wainwright, supra*.

"Indeed," says the learned annotator to *Clayton v. Blakey*, "to deny to such payment the effect of creating a tenancy from year to year, in cases where the letting was by parol for more than three years, would be to contravene, rather than obey, the enactment of the statute of frauds, since that act evidently means that such a parol lease shall enure in every respect as a lease at will. Now, one of the incidents of a lease at will is its convertibility by payment of rent into a tenancy from year to year." 2 Smith's Leading Cases, 180.

It surely would be difficult to find a case where the facts would more fully warrant the conclusion that a tenancy from year to year was created, than the one before us. The defendant himself testified that he wanted to rent the premises for three years, but that the plaintiff would not agree to that, but did agree to rent them for two years; and it is admitted that the defendant paid the rent for six months, and remained in possession for eight months, of the second year. From these acts no other inference can be made than that a yearly tenancy was intended to be created.

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There is another section of the statute which has some bearing upon the point we are considering, which provides that whenever there is a tenancy at will or by sufferance, created in any manner, it may be terminated on notice by either party, etc.; provided, that if any tenant for a year or more shall hold over after the expiration of his term, he may, at the election of his landlord, be considered as a tenant from year to year upon the terms of the original lease. Section 2, ch. 91, Tay. Stats. It may be said that this provision cannot apply to the case, because the tenant entered into possession under a parol lease, which was void. But this answer is not conclusive under the authorities upon the subject.

In *Lee v. Smith*, 9 Exch., 662, a tenant entered into possession of premises under an agreement in writing, which stipulated for a longer term than three years, and which was void under 8 and 9 Vict., ch. 106, because not under seal. The rent was to be paid quarterly in advance. The tenant occupied the premises for some time, paying rent, and on several occasions taking receipts which stated that the payments were made in advance. In an action for unlawful distress, it was held that, although the agreement was void under the statute, still the receipts taken were ample evidence that the plaintiff consented to be a tenant from year to year upon the terms that the rent should be payable at the beginning instead of at the end of each quarter.

In *Schuyler v. Leggett*, 2 Cowen, 660, there was a parol demise for seven years, which was void by the statute of frauds, yet it was decided that where possession was held under the lease it enured as a tenancy from year to year, and regulated the terms on which the tenancy subsisted in other respects. To the same effect are the cases of *The People v. Rickert*, 8 Cowen, 226; *Prindle v. Anderson*, 19 Wend., 391; *Lounsbury v. Snyder*, 31 N. Y., 514; *Lockwood v. Lockwood*, 22 Conn., 425; *Larkin v. Avery*, 23 Conn., 304; *Grant v. Ramsey*, 7 Ohio St., 157; 1 Washb. R. P., 614.

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A distinction must be made between a parol executory lease for more than one year and one where possession has been taken under the lease, and rent paid according to its terms. In the latter case, part performance may be said to withdraw the lease, for some purposes at least, from the operation of the statute of frauds. It is quite analogous to a parol contract for the sale of real estate, where the vendee has paid the consideration, and gone into possession of the property. Such part performance of the contract has frequently been held by this court to take the case out of the statute. Therefore, in the light of these authorities, we think the county court was correct in deciding, upon the finding, that the defendant, after the expiration of the first year, became a tenant holding over from year to year. All the admitted facts are incompatible with the idea that the tenancy was one from month to month; nor is there any ground for saying that the tenancy was terminated before the end of the second year by a surrender of the premises which was accepted by the landlord.

It follows from these views that the judgment of the county court must be affirmed.

By the Court. — Judgment affirmed.

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December 2 — December 16, 1879.

PRINCIPAL AND SURETY: *Official bond: how far judgment against principal evidence against surety.*

A judgment against the principal in an official bond, appearing by the record to have been recovered for acts or omissions which would be a breach of the conditions of the bond, is admissible against the sureties, in an action upon the bond, as at least *prima facie* evidence of plaintiff's right to recover, and of the amount he is entitled to recover.

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APPEAL from the Circuit Court for *Winnebago* County.

The case is thus stated by Mr. Justice TAYLOR:

"The plaintiff, as sheriff of Winnebago county, appointed Stephen W. Race one of his deputies, and took from him a bond, with *Shafer* and *W. W. Race*, the appellants, as his sureties. The bond was joint and several, and was conditioned 'that Stephen W. Race should well and faithfully in all things perform and execute the duties of the office of deputy sheriff of the county of Winnebago, during his continuance in office as deputy sheriff, without fault, deceit or oppression, and should pay over all money that might come into his hands as such deputy sheriff which might be so required by law.'

"An action had been brought against the sheriff to recover the amount of an execution issued upon a judgment rendered in a justice's court, which had been placed in the hands of his deputy, Race, and which he had failed to collect; and in that action a recovery was had against the sheriff, on the ground of negligence on the part of the deputy in not levying upon the property of the defendant in the execution, he having sufficient to satisfy the same, and that afterwards the execution debtor went into bankruptcy, and the plaintiff was unable to collect his debt. Of this action the deputy, Race, had notice, and appeared and defended the same at his own expense.

"After judgment in that action, the sheriff commenced the present action upon the bond of the deputy. Upon the trial, the judgment upon which the execution was issued and placed in the hands of Race, was admitted. The plaintiff offered in evidence the execution issued upon such judgment, together with the return of deputy Race thereon, 'that after using due diligence, and making diligent search, he was unable to find any personal property wherewith to satisfy the execution;' and then offered in evidence the judgment roll in the said action against the plaintiff. Defendants *W. W. Race* and *Shafer* objected to the judgment roll as evidence against them

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on several grounds; but the court below overruled the objections and permitted the record to be received in evidence.

"Plaintiff gave evidence that he had paid the judgment recovered against him, and some other evidence, tending to show that the defendant in the execution had personal property in the county out of which the amount of the execution might have been realized, while the same was in the hands of the deputy, Race; but, as the court directed the jury to return a verdict for the plaintiff for the full amount of the judgment recovered against him in the former action, that evidence is not important in determining the questions relied upon by the appellants for a reversal of this judgment."

From a judgment in plaintiff's favor pursuant to the verdict returned by direction of the court as above stated, the defendants *Shafer* and *W. W. Race* appealed.

Charles W. Felker, for the appellants, upon the question decided by this court, cited 1 Greenl. Ev., §§ 523, 538-9; Brandt on Suretyship, 107; 1 Starkie on Ev., § 32; 3 id., 1300; *Duchess of Kingston's Case*, per DE GRAY, C. J., 20 How. State Trials, 578; 9 Wheat., 681; *Gookin v. Sanborn*, 3 N. H., 491; *Tarbell v. Whiting*, 5 id., 63; 8 Wend., 512, 516; *Douglass v. Howland*, 24 id., 56; *Thomas v. Hubbell*, 35 N. Y., 121; 15 id., 405; 61 id., 356; *Beall v. Beck*, 3 H. & M. (Md.), 242; *Munford v. Overseers*, 2 Rand. (Va.), 313; *McKellar v. Bowell*, 4 Hawks, 41; *Lucas v. The Governor*, 6 Ala., 826; *Walker v. Forbes*, 25 id., 139; *Lartigue v. Baldwin*, 1 La. Cond., 356; *Snell v. Allen*, 1 Swan (Tenn.), 208; 27 Ohio, 498; *Pico v. Webster*, 14 Cal., 202; 10 id., 517; 7 Wis., 306; 36 id., 612. He also cited and distinguished *Duffield v. Scott*, 3 Term, 374; *Huzzard v. Nagle*, 40 Pa. St., 178; *Fay v. Ames*, 44 Barb., 327; *Rapelye v. Prince*, 4 Hill, 119; *Lee v. Clark*, 1 id., 56; *Westervelt v. Smith*, 2 Duer, 449; and *Crawford v. Turk*, 24 Gratt., 176 (which relate to bonds conditioned to indemnify against costs, damages and expenses which a sheriff might incur by reason of neglect or omission

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of duty, and in which it is held that such conditions anticipate litigation to which the obligors would not be parties, and are stipulations to be bound by the event of a suit between strangers); *Irwin v. Backus*, 25 Cal., 214; *Heard v. Lodge*, 20 Pick., 53; *Governor v. Shelby*, 2 Blackf., 26; *State v. Coste*, 36 Mo., 437; *Annett v. Terry*, 35 N. Y., 256; *Garber v. Commonwealth*, 7 Pa. St., 256; *Hobbs v. Middleton*, 1 J. J. Marsh., 176; and *Ralston v. Wood*, 15 Ill., 159 (where sureties on the bond of executor or administrator, or on a bail or appeal bond, and the like, have contracted with reference to the payment of money or property, or accounting therefor, or other particular act which by covenant their principals are bound to perform); and 44 Barb., 327; 2 Duer, 449; 5 Allen, 509; 8 Watts, 398; 17 S. & R., 354; and 5 Whart., 144 (where obligors upon a joint bond were held to be in privity of contract with each other, and regarded and treated, *quoad* the contract, as one person).

Moses Hooper, for the respondent, cited *State v. Jennings*, 14 Ohio St., 73; *State v. Colerick*, 3 Ohio, 487; *Westerhaven v. Clive*, 5 id., 136; *Westervelt v. Smith*, 2 Duer, 450; *Bartlett v. Campbell*, 1 Wend., 50; *Fay v. Ames*, 44 Barb., 327; *Drummond v. Prestman*, 12 Wheat., 515-19; *McLaughlin v. Bank of Potomac*, 7 How., U. S., 220; *Tracy v. Goodwin*, 5 Allen, 409; *Lowell v. Parker*, 10 Met., 309; *Prichard v. Farrar*, 116 Mass., 220; *Train v. Gold*, 5 Pick., 380; *Cony v. Barrows*, 46 Me., 498; *Dane v. Gilmore*, 51 id., 544-7; *Webbs v. State*, 4 Coldw., 199; 9 Yerger, 111; *Huzzard v. Nagle*, 40 Pa. St., 178; *Masser v. Strickland*, 17 S. & R., 354; *Evans v. Commonwealth*, 8 Watts, 398; *Charles v. Hoskins*, 14 Iowa, 471; *Lyon v. Northrup*, 17 id., 314; 2 Bibb, 453; *Bergen v. Williams*, 4 McLean, 125; Freeman on Judgm., § 180, and cases there cited.

TAYLOR, J. The complaint in the record of the action against the sheriff shows that plaintiff's cause of action in that

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case was founded upon the neglect of the deputy, Race, as above set forth.

The only exception to the evidence in this case which it is material to consider, is that taken to the introduction of the judgment roll in the action against the sheriff. The learned counsel for the appellants insist that, as they were not parties to that action, and had no notice thereof, it was not evidence against them in this action for any purpose. It is not denied but that it was properly received as evidence against Stephen W. Race, the deputy, as he had notice of the action, and defended the same, and was therefore bound thereby.

In the case presented by the record, the principal having had notice of the action against the sheriff for his default, and having appeared and defended that action, the judgment against the sheriff is just as conclusive against him as though the sheriff, after having been compelled to pay that judgment, had brought an action against his deputy for such neglect and misconduct, and had recovered judgment against him in that action.

The exceptions of the appellants present the question whether the sureties in an official bond are bound in any way by a judgment against their principal, in an action not brought upon such bond, for a breach of duty which they have covenanted against in such bond. After examining a great number of decisions in which the question has been discussed and decided, we think the great weight of authority, as well as the better reasons, are in favor of holding that the judgment against the principal is admissible as evidence against the sureties; and, without deciding how far and upon what points the same is conclusive, we hold that the same is at least presumptive evidence of the right of the plaintiff to recover, and of the amount of such recovery, when the execution of the bond is proved or admitted, and the record of the former judgment shows that the recovery was for acts or omissions the proof of which would show a breach of some one or more of the conditions of the bond.

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It is urged by the counsel for the appellants that such judgment is "*res inter aliq̄s acta*," and therefore not admissible. We think otherwise. It will be remembered that in an action of this kind the plaintiff's right of action depends upon the fault or misconduct of their principal, and such fault or misconduct must be proved in the action in order to entitle the plaintiff to recover at all. It would seem, therefore, that a judgment against such principal, which is absolutely conclusive against him that he was guilty of such fault, ought to be at least presumptive evidence against his sureties of that fact.

It is evident that the sureties could, in an action against them, make use of a judgment in an action against their principal as a defense, when the judgment was in his favor.

Suppose in this case the sheriff had first brought his action against the principal, such principal not having had any notice of the proceedings against the sheriff, and in such action the jury had found a verdict in favor of the defendant, on the ground that he had not been guilty of any neglect in not collecting the amount of the execution; and after such verdict and judgment the sheriff had brought his action against the sureties in the bond of the principal, alleging the same neglect of the deputy as his cause of action: is it not evident that the sureties could use the judgment in favor of their principal as a complete answer to the plaintiff's cause of action? The judgment in favor of the principal in the former action would be conclusive evidence against the sheriff that he had not been guilty of the neglect charged against him. The sheriff could only recover in the action against the sureties by proof of the guilt of their principal, and, as between the sheriff and the principal, the question of his guilt would be *res adjudicata* in the first action. Such judgment would therefore be a complete bar to the action against the sureties.

Again, if the sheriff had sued the principal without joining the sureties, and had recovered a sum of money less than

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he had been compelled to pay on account of the default of his deputy, and had then commenced a suit against his sureties, claiming a larger sum, it is also evident that the judgment against the principal would be conclusive in favor of the sureties as to the highest amount of damages he could recover against them. The judgment against the principal would be conclusive against the sheriff as to the extent to which he had been damaged by his default; and the sureties, who are to answer only to the extent of the injury sustained by the sheriff on account of the default of their principal, could avail themselves of the verdict in the former action to limit the amount of damages, and the sheriff would be as completely bound by the same as though he had expressly agreed that his damages did not exceed the amount of the former verdict.

These illustrations show that the judgment in the action against the principal is not entirely "*res inter alios acta*" as to the sureties. Such judgment, if adverse to the plaintiff, is conclusive in favor of the sureties, and in any event is conclusive as to the extent of damages which he may recover against them. This view of the question is maintained in the following cases: *Masser v. Strickland*, 17 S. & R., 354, 358; *Drummond v. Prestman*, 12 Wheat., 515, 519, 520; *Webbs v. State*, 4 Coldw. (Tenn.), 200, 202.

There is another view of the question which is well stated by a very able and learned judge, Chief Justice SHAW, in the case of *The City of Lowell v. Parker et al.*, 10 Met., 309, 315, which was also an action against the sureties on an official bond. In reply to the same objection which is made in this case, that the judgment against the principal was *res inter alios*, and therefore not admissible against the sureties, the learned chief justice said: "We think this objection cannot be supported under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for the failure of the performance of such duty, if not

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conclusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proofs."

Other courts have placed the admissibility of the judgment against the principal in evidence against the surety, in cases where the bond is the joint bond of the principal and surety, or their joint and several bond, on the ground that, as the judgment against the principal in the first action is conclusive against him in the second, it must have the same effect as against his coobligors; and others on the ground that, in a case like the present, a notice to the principal, who is one of the coobligors in the bond with the surety, is notice to all, and, therefore, all are bound by the judgment against the principal. These reasons for holding the judgment against the principal evidence against the sureties, were relied upon to some extent in the following cases: *Bartlett v. Campbell*, 1 Wend., 50; *Fay v. Ames*, 44 Barb., 327, 333; *Evans v. Commonwealth*, 8 Watts, 398; *Eagles v. Kern*, 5 Wharton, 144.

The reasons for holding to the rule laid down by Chief Justice SHAW in the case above cited, we think, are most satisfactory, and, as we understand them, they are the following: *First*. Because the judgment in the action against the principal, when in his favor, is a complete bar to the action against the sureties, and in any case fixes an absolute limit to the damages which can be recovered against them, it should be mutual, so far, at least, that when the judgment is against the principal, it should be presumptive evidence against the sureties. *Second*. The nature of the contract in official bonds is that of a bond of indemnity to those who may suffer damages by reason of the neglect, fraud or misconduct of the officer. The bond is made with the full knowledge and understanding that in many cases such damages must be ascertained and liqui-

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dated by an action against the officer for whose acts the sureties make themselves liable; and the fair construction of the contract of the sureties is, that they will pay all damages so ascertained and liquidated in an action against their principal. This construction of the contract is the most reasonable, and works no hardship against the sureties. It is better for them that this should be so. Otherwise it would be necessary for every person who desired to hold the sureties for the misconduct of their principal, to join them in the first action, or else be subjected to a second litigation of the same matter, if, unfortunately, he should fail to obtain satisfaction after judgment against the principal; whereas, if the rule held in the case of the *City of Lowell v. Parker*, *supra*, is adhered to, the party injured will in most cases litigate the matter with the principal alone.

The principal is the one who ought to be at the expense of the litigation, and who ought to pay the damages. He is also the one who has the knowledge of the facts, and is certainly better prepared to litigate the matter than the sureties, who are not supposed to have any knowledge of the transaction. Certainly the defense is likely to be properly made by the principal, who has full knowledge of the facts, and who is to suffer most severely in case of a decision adverse to him. In most cases of this kind, if the sureties were sued in the first instance, with their principal, the defense of the action would be made by such principal; and yet the judgment in such an action would necessarily be conclusive upon all. Holding the judgment against the principal alone presumptive evidence, as against the sureties, of the facts established by such judgment, can work no hardship so long as the right is reserved to them of showing that the defense in such action was not made in good faith, was fraudulent, collusive, or suffered to be obtained through mistake as to the facts.

The rule laid down in the case of *City of Lowell v. Parker* is fully sustained by the following cases: *Lee v. Clark*, 1 Hill,

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56; *Franklin v. Hunt*, 2 Hill, 671; *Westervelt v. Smith*, 2 Duer, 449; *Annett v. Terry*, 35 N. Y., 256; *Fay v. Ames*, 44 Barb., 327; *Bartlett v. Campbell*, 1 Wend., 50; *Huzzard v. Nagle*, 40 Pa. St., 178; *Eagles v. Kern*, 5 Wharton, 144; *Evans v. Commonwealth*, 8 Watts, 898; *Masser v. Strickland*, 17 S. & R., 354; *Webbs v. State*, 4 Coldw. (Tenn.), 199, 200; *Atkins v. Baily*, 9 Yerger, 111; *Baxter v. Marsh*, 1 Yerger, 460; *Drummond v. Prestman*, 12 Wheat., 515; *McLaughlin v. Bank*, 7 How. (U. S.), 220, 229; *Iglehart v. State*, 2 Gill & Johns. (Md.), 235, 245; *Dane v. Gilmore*, 51 Maine, 544, 551, 555; *Tracy v. Goodwin*, 5 Allen, 409; *Train v. Gold*, 5 Pick., 380; *Charles v. Hoskins*, 14 Iowa, 471; *Lyon v. Northrup*, 17 Iowa, 314; *Duffield v. Scott*, 3 T. R., 374; *Jones, Adm'r'x, v. Williams*, 10 L. J., N. S., Exch., 120, 123; *State v. Woodside*, 7 Ired. (N. C.), 296; *McLin v. Hardie*, 3 Ired., 407; *State v. Colerick*, 3 Ohio, 487; *Westerhaven v. Clive*, 5 Ohio, 136.

The only cases in this court bearing upon this question are *Gerber v. Ackley*, 32 Wis., 233; *Saveland v. Green*, 36 Wis., 612; and *Elwell v. Prescott*, 38 Wis., 274. Neither of these cases decides the point in question. Freeman on Judgments, § 180.

The learned counsel for the appellants has cited several decisions, of courts in New York and other states, which seem to hold the doctrine contended for by him, and particularly relies upon the cases of *Douglass v. Howland*, 24 Wend., 35, and *Thomas v. Hubbell*, 15 N. Y., 405. Of these cases it may be said, that the court of appeals, in the case of *Thomas v. Hubbell*, 15 N. Y., 405, did not hold that the judgment against the principal could not be received as *prima facie* evidence against the sureties, but did hold that the sureties were at liberty, notwithstanding the judgment against the principal, to show that there was a good defense as against their principal to the action, and so defeat the plaintiff's action. When this case came before the court of appeals the

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second time (35 N. Y., 121), the judgment for the plaintiff in the court below was affirmed. But the court held that the judgment against the principal was conclusive as to the amount of damages the plaintiff could recover against the sureties, and that they were not concluded by the judgment as to the merits of the action, but might show affirmatively that the plaintiff had no right of action against their principal, as a defense, the same as was held on the first appeal. It would seem that in both cases, both in the court of appeals and the court below, the judgment was considered as *prima facie* evidence, but that the defendants were not concluded by it.

In the case of *Douglass v. Howland*, the action was brought upon a contract by which the principal agreed to account for and pay over such sum as should be found due and owing by him to the plaintiff, and which the defendant had guaranteed the performance of. The plaintiff had filed a bill against the party to compel him to render an account and pay over what was due, and had judgment against the party, which was not paid; afterwards he brought suit against the guarantor upon his covenant to guaranty. Upon the trial of this action the plaintiff offered the decree in evidence against the guarantor. Justice COWEN, who delivered the opinion of the court, after an able and quite exhaustive review of the cases, comes to the conclusion that the record was not admissible, as being *res inter alios acta*; but at the close of his argument it seems to me he very greatly weakens its force by admitting that if the party for whom the defendant was guarantor had rendered an account voluntarily, and without action, and had admitted an amount due upon such account, the balance so struck by the parties would have been conclusive upon the guarantor; "that the striking of such balance would be an admission making a part of the *res gestæ*," and bind the defendant. To me there does not seem to be any force in the distinction made by the learned judge. If the rendering of an account voluntarily by the principal would bind his surety, why should

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he not be bound when such account is rendered under the watchful and unprejudiced supervision of a court of chancery? Certainly it could make no difference whether the account was rendered in or out of court, if the account was rendered and balance struck by the principal himself. Within the decision of the learned justice, if the record of the proceedings in chancery had shown that the court had found the balance upon an account rendered by the principal and as struck by him, the account so rendered, though a part of the proceedings in the former action, would have been evidence against the guarantor, and would have concluded him. This was expressly held by the court in the case of *Iglehart v. State*, 2 G. & J., 235, 245. See, also, on the same point, *Drummond v. Prestman*, 12 Wheat., 519, and cases cited; *Tyler v. Ulmer*, 12 Mass., 164; *Mott v. Kip*, 10 Johns., 478; *Governor v. Twitty*, 1 Dev., 153.

If the admissions, statements and confessions of judgment by the principal are to be received in evidence against the sureties, as either presumptive or conclusive proofs of the facts admitted, stated or confessed, there does not appear to be any good reason for holding that the findings of a court or jury upon such admissions, statements or confessions should not be presumptive evidence of such facts against them.

Whilst we are compelled to admit that the authorities are conflicting upon the question under consideration, we are clearly of the opinion that the weight of authority is in favor of holding the judgment against the principal in an official bond *prima facie* evidence against the sureties.

The defendants having given no evidence upon the trial in the court below, upon the proofs offered by plaintiff he was clearly entitled to judgment, and there was no error in directing the jury to find for him.

By the Court.—The judgment of the circuit court is affirmed.

Felt vs. Amidon and others.

FELT vs. AMIDON and others.

December 2 — December 16, 1879.

Stay of proceedings: Order not appealable.

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1. On reversal by this court of a judgment in favor of the plaintiff in an action, the circuit court has power to stay his further proceedings therein until he shall pay the costs adjudged against him on the appeal; and the order, being grantable at discretion, is not appealable.
- [2. Plaintiff's remedy in case he deems the stay unreasonable, somewhat considered per TAYLOR, J., but not determined; and cases suggested in which an order staying proceedings until a specific act be performed, may be appealable under subd. 1, sec. 3069, R. S.]

APPEAL from the Circuit Court for *Dodge* County.

This court having reversed a judgment recovered by the plaintiff against the defendants in this action, and awarded costs to defendants (43 Wis., 467), the circuit court, after the cause was remitted, made an order, on defendants' motion, staying proceedings in the action on plaintiff's part until such costs should be paid. Plaintiff appealed from the order.

The cause was submitted on the brief of *E. P. Smith* and *H. W. Sawyer* for the appellant, and that of *H. W. Lander* and *J. B. Hays* for the respondent.

For the appellant it was contended, 1. That the order was appealable. *Tubbs v. Doll*, 15 Wis., 640; *Dole v. Northrop*, 19 id., 249; *Abbott v. Johnson*, 47 id., 239. The record shows that the plaintiff is poor and unable to pay the costs; and under these circumstances the order *in effect* determines the action and prevents a judgment from which an appeal might be taken. Besides, when an order staying proceedings is made in a case where the court has no *authority* to grant it, the order must be appealable. If an action *ex contractu* were stayed until plaintiff's note to defendant should be paid, the order would certainly be appealable, defendant's proper remedy being by counterclaim and not by a stay. In *Flanders v. Merri-*

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mac, 44 Wis., 621, an order conditioning a change of venue upon payment of costs was held appealable; and one conditioning plaintiff's right to prosecute his action at all upon payment of costs must also be appealable. *Cram v. Bradford*, 4 Abb. Pr., 193; *Green v. Wood*, 6 id., 277; *La Farge v. La Farge Ins. Co.*, 14 How. Pr., 26; *Abbott v. Johnson*, 47 Wis., 239. Any act which has the effect to defeat or embarrass plaintiff's remedy, is in conflict with the principle and whole policy of the common law. *Lock Co. v. Railroad Co.*, 10 Am. Law. Reg., N. S., 260-63; *Smith v. N. Y. Cent. R. R. Co.*, 43 Barb., 225. 2. That, as defendants had judgment for their costs, and had issued execution therefor, their object in procuring the stay must have been either to bar plaintiff's action or to use the order as a proceeding supplemental to execution; that a proceeding by that method for that purpose is wholly unauthorized; and that the only way to review it was by appeal. *Sudlow v. Knox*, 7 Abb. Pr., N. S., 411. 3. That as the supreme court had granted a new trial absolutely, and not conditioned upon payment of the costs of that court, the circuit court had no right to deny such new trial. The supreme court awarded an execution to collect the costs; and it has exclusive jurisdiction over its own judgments and costs awarded therein, and competent power to enforce such judgments (R. S., secs. 2407, 2953); and the circuit court has no control over such judgments. R. S., sec. 2420; 63 Barb., 417; and see *Platto v. Deuster*, 22 Wis., 485; *Endter v. Lennon*, 46 id., 300. 4. That the effect of the order was to deny plaintiff's right to have his remedy "promptly and without delay," and compel him to *purchase* justice, in contravention of sec. 9, art. I of the state constitution. The fact that a stay of proceedings may be granted in one action until another involving the same question is decided, has no bearing here, since in such cases the question is left to be settled without delay in one of the actions. *Whittaker v. Janesville*, 33 Wis., 76; *Durkee v.*

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Janesville, 28 id., 464; *Oatman v. Bond*, 15 id., 20. 5. That the court has no power in either awarding or collecting costs, except as specially provided by statute. *Re Jackman*, 26 Wis., 144; *Abbott v. Johnson*, *supra*. In New York, when causes have been stayed until costs already adjudged were paid, no question of plaintiff's ability to pay them entered into the case; and a poor plaintiff was entitled to sue *in forma pauperis*, free from costs. A stay of proceedings in that state until costs of a former cause or trial are paid, is based upon the presumption that the proceedings are vexatious. *Ex parte Stone*, 3 Cow., 380; *Lawrence v. Dickenson*, 2 id., 580; *Demarest v. Wynkoop*, 2 Johns. Ch., 561; *Kerr v. Davis*, 7 Paige, 53; *Pinney v. Johnson*, 2 Wend., 623. And this view has been adopted and emphasized in this state. *McIntosh v. Hoben*, 11 Wis., 400. 6. That it appeared clearly from the record that since the commencement of the action defendants had disposed of their unexempt property, to prevent the collection of any judgment which plaintiff might recover herein; and that under such circumstances they were not entitled to any favor at the hands of the court, and they should be left to offset the costs in question against the judgment which plaintiff may recover.

For the respondents it was argued, 1. That the order was not appealable under subd. 5, sec. 3069, R. S., as involving the merits or affecting a substantial right. *Rahn v. Gunnison*, 12 Wis., 528; *Kewaunee Co. v. Decker*, 28 id., 669; *Johnston v. Reiley*, 24 id., 494; *Parmalee v. Wheeler*, 32 id., 429; *Noble v. Strachan*, id., 314; *Will of Kneeland*, 40 id., 344; *Blesch v. Railway Co.*, 44 id., 593. 2. That the order was right, and within the sound discretion of the court. *McWilliams v. Bannister*, 42 Wis., 301; *McIntosh v. Hoben*, 11 id., 400; *Jackson v. Schaubert*, 4 Wend., 216; *Kentish v. Tatham*, 6 Hill, 372. No constitutional objection lies against the order which would not be equally valid against the power to impose costs at all, and especially against the power granted by law to both the circuit courts and justices' courts, to require plaintiff

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iffs in certain cases to give security for future possible costs before proceeding with their actions at all. R. S., secs. 2942, 3782; *Campbell v. Railway Co.*, 23 Wis., 490.

TAYLOR, J. This is an appeal from an order of the circuit court staying proceedings on the part of the plaintiff and appellant until he pays the costs awarded to the respondents by this court upon the reversal of the judgment recovered against them in this action. It is insisted by the learned counsel for the respondents, that the order is not appealable under the statute.

The right to appeal from an order of the circuit court to this court is given and limited by section 3069, R. S. 1878, which section is substantially section 10, ch. 264, Laws of 1860, 2 Tay. Stats., 1635.

If this order be appealable at all under the provisions of said section, it must be under the first subdivision, which reads as follows: "An order affecting a substantial right in any action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken."

It is insisted by the learned counsel for the appellant, that the order appealed from comes within the spirit, if not within the letter, of this provision, and that the order does in effect determine the action, and prevents a judgment. It is possible that the order may have that effect, but it does not by its terms. The stay is only granted until the plaintiff shall pay a certain amount of costs due to the respondent. If the money be paid, the stay of the plaintiff's proceedings ceases, and he may then proceed to judgment. We think this section refers to such orders, and such only, as by their very nature determine the action or prevent a judgment; and does not cover orders which simply stay the proceedings of the plaintiff until he shall perform some act or pay a sum of money. An order which stayed proceedings until an act should be per-

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formed which it was impossible to perform, or which required the performance of an unlawful act, might be construed to be an order which determined the action or prevented a judgment, and as therefore within the provision above quoted, and appealable; but when an order stays proceedings until an act shall be performed which is not illegal, and which is such as can ordinarily be performed, such stay cannot be said to determine the action or prevent a judgment.

An order staying proceedings in an action, not amounting to a perpetual stay, is generally within the discretion of the court in which the action is pending; and, when granted for a cause which is a good ground for a stay, in the discretion of the court granting it, such order is not appealable. This court has so held in the following cases: *Johnston, Ex'r, v. Reiley*, 24 Wis., 494; *Parmalee v. Wheeler*, 32 Wis., 429; *Noble v. Strachan*, id., 314; *McLeod v. Bertschy*, 30 Wis., 324; *In re the Will of Kneeland*, 40 Wis., 344; *McDonald v. The Green Bay & Miss. Canal Co.*, 42 Wis., 335; *Blesch v. Railroad Co.*, 44 Wis., 593, 595. These cases seem to have settled this question. But it is insisted that if the facts upon which the order staying proceedings is based are such that it is evident that the court granting the stay had no right to grant the same, or that the granting of the same was an abuse of discretion, then this court ought to take jurisdiction, upon appeal from such order, and reverse the same. This does not seem to have been the view taken by this court in the cases above cited.

It seems that the proper method to be pursued, in the first instance, by the party complaining of the stay, when he deems the stay unreasonable, is to move the court granting the same either to vacate or modify the same. If, upon such motion, the court should arbitrarily or unreasonably refuse to modify or vacate the order, some of the cases above cited intimate that an appeal from such last order would be sustained, probably upon the ground that such order would in-

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volve the merits of the action, or some part thereof, within the meaning of subdivision 4 of said section 3069. Such appears to have been the opinion of Justice LYON, as intimated in *Noble v. Strachan*, *supra*. In the case of *In re the Kneeland Will*, *supra*, Justice COLE strongly intimates that the remedy in such case would be by *mandamus*. Without determining what would be the proper remedy of the person prejudiced by an arbitrary and unjust refusal to vacate an order staying proceedings unreasonably, we are satisfied that such order, made in the first instance upon facts which call for the exercise of the discretion of the court below, is not appealable.

We might rest this case here; but, as the learned counsel for the appellant insists that the circuit court exceeded its powers in granting the stay in this case, we will briefly examine that question. Had the court the right to stay plaintiff's proceedings until the costs of the appeal in the action were paid? There being no law of this state forbidding the granting of such stay, we think the court had the right to make the order in its discretion, upon the facts appearing on the motion. If, after an honest effort on the part of the appellant to comply with the order, it should be made to appear to the court below that it was impossible for him to comply therewith, on account of his poverty and inability to induce any one to advance the money to pay such costs, and if the court should refuse to modify or vacate such order, it might present the question whether the court had abused its discretion in continuing the order. Whether absolute inability, on account of poverty and want of credit, to pay the costs, is in any case a full defense to an application to stay proceedings in his action until the same are paid, it is unnecessary to decide in this case, as the evidence upon which the order was made does not establish that fact. Even in such case we think the court would be justified in granting the order, if it appeared that the prosecution was vexatious or without merits; and in a case where it

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satisfactorily appeared that the plaintiff had a good cause of action, and was prosecuting it in good faith, it is hardly to be anticipated that the court would prohibit his prosecution thereof permanently, by requiring him to pay costs which it was impossible for him to pay.

Poverty alone is not a sufficient reason for requiring a plaintiff to give security for costs. *Watson v. Fraser*, 10 L. J., 1841, Exch., 420; *Yarworth v. Mitchel*, 2 Dow. & Ryl., 423; 1 Marshall's Reports, 4; *Senter v. Carr*, 15 N. H., 375. While poverty alone should not be a sufficient cause for granting a stay of proceedings until costs accrued and due to the opposite party are paid, neither is it a good defense to an application to stay proceedings until costs incurred have been paid, when it appears that the prosecution is vexatious or not carried on in good faith.

It was held in the court of King's Bench in England, that a plaintiff who was prosecuting an action *in forma pauperis* should have his proceedings stayed until he paid the costs of a former action between the same parties for the same cause, in which he had been nonsuited. *Weston v. Withers*, 2 Term R., 511, and cases, decided in 1788; *Haigh v. Paris*, 16 L. J., 1847, Exch., 37, decided in 1846.

It is almost a universal rule, that, when a plaintiff has been nonsuited in an action, he will not be permitted to proceed in another action against the same parties for the same cause until he has paid the costs of the former action. This rule is based upon the presumption that the second action is vexatious, or, if not vexatious, that the failure to succeed in the first action was attributable to the fault of the plaintiff, and that it would be unjust to permit him to proceed with the second action until the costs to which the opposite party was put by the first prosecution are paid. The rule as to staying proceedings until costs incurred in the same action and payable to the opposite party are paid, is not, perhaps, as well established as the rule in regard to the costs of a former action between the same

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parties for the same cause. The reasons, however, which induce the courts to stay proceedings in the latter case, will apply with more or less force to the former. But courts should, perhaps, be more cautious in applying the rule to the case of costs incurred and payable to the opposite party on a reversal of a judgment in favor of a plaintiff, than in the case of the commencement of a second suit after failure to prosecute the first to judgment. In the latter case the failure is very generally attributable to some fault or neglect of the plaintiff; and in the former, the fact that he has prosecuted the case to judgment in his favor is, to say the least, some evidence that he has a good cause of action against the defendant, and of the good faith of the plaintiff in prosecuting the same; and the reversal thereof upon appeal may be upon questions that neither impeach the plaintiff's good faith nor tend to show that he has not a meritorious cause of action. The court would hardly be justified, therefore, in staying the plaintiff's proceedings upon the sole ground that the costs of the appeal were not paid.

Ordinarily there would be no necessity for a stay, as the costs could be collected upon execution; but when the plaintiff has no property which can be seized upon execution, and it is shown that he has the means of paying and refuses payment, it would be a proper exercise of the power of the court to constrain payment by a stay of proceedings, rather than put the opposite party to the extraordinary proceeding of garnishment, or a bill in equity, to collect the same; or if the party were poor and unable to pay without the aid of his friends, still the court would be justified in staying his proceedings until such costs were paid, if it appeared that he was clearly in fault, and that such costs were caused by his laches or misconduct, or if there was a want of good faith in prosecuting the case further.

This court, in the case of *McIntosh v. Hoben*, 11 Wis., 400, recognizes the right to stay proceedings until the costs of an

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appeal in the action are paid. See, also, the case of *Mc Williams v. Bannister*, 42 Wis., 301. The supreme court of New York stayed the plaintiff's proceedings until the costs upon a reversal of judgments in his favor by the court of errors were paid. *Jackson v. Schaubert*, 4 Wend., 216. The case was similar to the one at bar. There was no question as to the ability of the plaintiffs to pay the costs, but it appeared that they avoided attachments which had been issued to compel their payment. See, also, *Dresser v. Brooks*, 1 Abb. Dec., 555. In this case the court of appeals stayed the proceedings on a second appeal until the costs of the first appeal were paid.

We have no doubt of the propriety of staying the plaintiff's proceedings, under proper circumstances, for not paying costs which have been adjudged to the defendant, upon an appeal, by this court. The fact that the defendant has a judgment for such costs, upon which an execution can issue, is no bar to the making of such order. If that fact precludes the court from granting such order, then it would preclude the court from staying proceedings for the nonpayment of the costs of a former action in which the plaintiff was nonsuited, as in all such cases the defendant is entitled to judgment and execution for such costs; yet, in the very large number of cases in which such stay has been granted, both in the English courts and the courts of this country, such objection has never been held to be a bar to granting the stay.

There being no doubt as to the power of the court to grant the stay until the costs of the defendant on the appeal are paid, and the order being one which is granted in the discretion of the court in which the action is pending, it is not appealable.

By the Court. — The appeal is dismissed, with costs.

Westphal vs. Schultz.

WESTPHAL VS. SCHULTZ.

December 17, 1879 — January 7, 1880.

48	75
78	31

SURVEYS. *Sixteenth-section corners — how determined.*

Where only section and quarter-section corner posts were established by the original government survey of a quarter section bordering on the north line of a town, the sixteenth corner posts must be determined, upon a resurvey, in the manner prescribed by the statute (sec. 4, ch. 823 of 1860; sec. 5, ch. 120 of 1862; R. S., sec. 770). *Jones v. Kimble*, 19 Wis., 430.

APPEAL from the Circuit Court for Winnebago County.

Ejectment. The defendant appealed from a judgment in plaintiff's favor. The circuit judge found the facts substantially as follows:

Plaintiff is, and was at the commencement of the action, owner in fee simple and entitled to the possession of the north half of the northwest quarter of a certain section of land; while defendant was and is, in like manner, owner and entitled to the possession of the south half of the same quarter section. The government plats and survey show, in the north half of said quarter section 96.06 acres, and in the south half 80 acres of land; but the actual amount of land in the whole quarter section is only 169.85 acres. The distance from the west quarter post to the northwest corner of the section appears by the government survey and field notes to be 43 chains and 87 links; while the actual distance is 42 chains and 16 links. Defendant is, and was at the commencement of the action, in possession of the south 80 acres of said quarter section, claiming title thereto; and the north line of the tract so occupied by him was marked by a fence. *If the sixteenth posts on the east and west ends of the north half of the section be fixed by dividing the deficiency in the measurements of the east and west lines of said half section [as compared with the measurements called for by the government survey]*

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between the north and south posts [parts?] of said north half of the section, and those sixteenth posts be connected by a straight line, such line will run south of said fence, and distant from the same, at the west side of the northwest quarter 76 links, and at the east side of said quarter 27 links; and between said line and the fence will be included 2.06 acres. If the deficiency in the area of the northwest quarter [as compared with the area called for by the original survey] be divided proportionately between the north and south halves of said quarter section, the boundary line between the two halves will lie south of said fence, and distant from it, at the west end 76 links, and at the east end 36 links; and between said line and the fence will be included 2.24 acres. The north half of said quarter section contains two fractional forties, bounded on the north by the town line; and these contain respectively, according to the government survey, 48.11 acres and 45.95 acres; and by actual survey, apportioning the deficiency in area, 45.85 and 46.06. And by actual survey, allowing to the south half of the quarter section full 80 acres as claimed and possessed by defendant, said two northern fractional forties contain respectively 44.64 and 45.21 acres. The corner posts at the northeast, northwest and southwest corners of the section, and the east, west and south quarter posts, are all in existence, and were found by the county surveyor, who resurveyed the land and made a map used at the trial.

As conclusions of law, the court held, 1. That the boundary between the north and south halves of said northwest quarter section is the straight line connecting the two sixteenth posts fixed in the manner described above in italics. 2. That plaintiff was entitled to recover of defendant, as owner in fee, the 2.06 acres of land included between said line and defendant's north fence, as above stated.

Defendant excepted to each of the conclusions of law, and appealed from a judgment rendered in accordance therewith.

Chas. W. Felker, for appellant, argued, that while a resurvey

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may be had in case of a lost boundary (*Jones v. Kimble*, 19 Wis., 429; *Martin v. Carlin*, id., 454; *Neff v. Paddock*, 26 id., 546; *McEvoy v. Loyd*, 31 id., 142), and it is probably competent for the legislature to establish a rule regulating surveys in such cases, yet, where the original monuments of the government survey can be found, these must control notwithstanding the statute (*Jones v. Kimble*, *Neff v. Paddock* and *McEvoy v. Loyd*, *supra*); and that, inasmuch as all the monuments fixed by the government survey in this case can be found, and the line between the north and south halves of the quarter section (claimed by the parties respectively), fairly established from such monuments, defendant could not be compelled to submit to a resurvey which would deprive him of a portion of his property without compensation.

Moses Hooper, for the respondent:

It is settled for this state at least, that there should be an apportionment of the excess or deficiency in measurement in government surveys, between subdivisions, where corners are not established and lines not run by the government. *Jones v. Kimble*, 19 Wis., 429; *O'Brien v. McGrane*, 27 id., 446; *McEvoy v. Loyd*, 31 id., 138. See also Hawes' Man. of U. S. Surveying, 124-5, 142; *Moreland v. Page*, 2 Clarke (Iowa), 139; *Britton v. Ferry*, 14 Mich., 53, 71; *Thom v. Patten*, 13 Me., 329; *Wolf v. Scarbro*, 2 Ohio St., 363; *Francois v. Maloney*, 56 Ill., 399; *Marts v. Williams*, 67 id., 306. The contrary doctrine is not held in *Keasling v. Truitt*, 30 Ind., 306, where the opinion does not sustain the syllabus.

ORTON, J. The land recovered in this action is a strip between the north and south half of the northwest quarter of section 2, township 20 north, range 16 east. This section is fractional, and is bounded on the north by the town line. It appears from the government survey and field notes, that the north half of said quarter section contains 96 and 6-100 acres,

and the south half 80 acres, and that the whole length of the west line of the quarter is 43 chains and 87 links.

It appears upon a resurvey, allowing full 80 acres to the south half of the quarter, the north half contains less than the number of acres called for by the government survey, and this deficiency in the excess is apportioned between the number of acres, as marked, of the two halves of the quarter, which gives the strip here claimed and recovered. The section corner posts and the quarter posts were in existence, by which the survey was made; but no eighth and sixteenth corner posts were ever established, and these corners are therefore found and located by the resurvey as above.

The rule by which this resurvey was made is clearly defined by section 4, ch. 323, Laws of 1860, as follows: "Whenever a surveyor is required to subdivide a quarter section bordering on the north boundary of a township, he shall establish the sixteenth-section corner at a distance twenty chains north of the quarter-section corner, unless the quarter section shall exceed or be less than the original survey, in which case said sixteenth corner shall be established in exact ratio to such excess or deficiency." This rule is made applicable to all fractional sections by section 5, ch. 120, Laws of 1862, and in the late revision it is expressed in the following language: "Unless the quarter line vary in actual length from the length stated in the original survey, in which case such sixteenth corner shall be established at a greater or less distance, in exact ratio to the excess or deficiency in the actual length of the quarter line."

The case of *Jones v. Kimble et al.*, 19 Wis., 430, was one in which the quarter posts of a fractional section, bounded upon the north by a township line, were lost, and they were established by a resurvey according to the above rule. In that case this court fully approved and sanctioned this rule of the statute as being right, and cited favorably the case of *Moreland v. Page*, 2 Clarke (Iowa), 139, which is the leading

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case upon the question, and in favor of the rule. Since the above decision by this court, the correctness of this rule has not been an open question.

The authorities cited by the learned counsel of the appellant, which require section-corner posts and quarter posts, and other monuments fixed by the original survey, to be consulted in all resurveys, and which make such monuments govern, are inapplicable, because here no eighth or sixteenth corners were established by the original survey; and they have been found and fixed by this resurvey, according to the above rule, *from* the section-corner posts and quarter posts which were found in existence as set by the original survey. The findings of the learned judge of the circuit court were correct.

By the Court.—The judgment of the circuit court is affirmed, with costs.

WALLACE VS. THE CITY OF MENASHA.

December 17, 1879—January 7, 1880.

CITIES. *Liability for act of treasurer in selling chattels for delinquent taxes.*

1. A city is not liable in tort for the act of its treasurer, acting in good faith in the execution of his tax warrant, in seizing and selling the chattels of one person for the delinquent taxes of another.
2. Whether an action will lie against the city, as for money had and received, to recover the proceeds of the sale of such property, paid into the treasury, or any part thereof, not considered.

APPEAL from the Circuit Court for *Winnebago* County.

Action to recover damages for the alleged unlawful conversion by the defendant city of certain personal property of the plaintiff.

The facts, as they appear from the pleadings, evidence and findings of the judge, are briefly as follows: The annual tax list of the city of Menasha for 1875 was duly made. The proper warrant to the treasurer to collect the taxes assessed

48	79
75	520
48	79
91	244
48	79
108	863

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therein, signed by the mayor and clerk, and sealed with the city seal, was appended thereto, and the same was delivered to the city treasurer. Such tax list included state, county, school and city taxes to be collected for that year in the city of Menasha. A tax of \$70.50 was therein assessed against the firm of Kelley & Co. That firm neglected or refused to pay such tax; whereupon the treasurer seized and sold the property described in the complaint, and from the proceeds of the sale satisfied the tax against Kelley & Co. The property belonged to the plaintiff, and was of the value of \$300.

On these facts the court held that the plaintiff was entitled to judgment against the city for the value of the property, with interest and costs. From the judgment rendered against it pursuant to this determination, the city appealed.

The cause was submitted on the brief of *E. Mariner* and *C. A. Hamilton* for the appellant, and that of *C. W. Felker* for the respondent.

For the appellant it was argued, 1. That the levy and collection of taxes by the defendant city is not a corporate act from which it derives special benefit, but is simply the exercise of a public governmental power delegated to it by the state; and for negligence in the exercise of that power defendant is not liable. *Cooley's Con. Lim.*, 517-519; *Knowlton v. Supervisors*, 9 Wis., 388; *Hart v. Bridgeport*, 13 Blatchf., 291; *Bailey v. Mayor*, 3 Hill, 539. 2. That the city treasurer is an independent public official, over whose action in the collection of a tax defendant had no control, beyond signing and sealing the warrant issued in the name of the state; that after receiving such warrant the treasurer acted as an officer of the state, under its mandate and not under that of the defendant; and that for this reason defendant is not liable in an action of tort for the treasurer's misfeasance. City charter (Laws of 1874, ch. 127), subch. IV, sec. 6; *Cook v. City of Macon*, 54 Ga., 468; *Williams v. Village of Dunkirk*, 3 Lans., 50; *Lorillard v. Town of Monroe*, 11 N. Y., 392; *Bank of Common-*

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wealth v. The Mayor, 43 id., 189; *Hayes v. Oshkosh*, 33 Wis., 318; *Fisher v. Boston*, 104 Mass., 87. 3. That even if the treasurer was defendant's agent, defendant is not liable for his willful trespass. *Boom v. Utica*, 2 Barb., 104; *Sherman v. City of Grenada*, 51 Miss., 187; *Williams v. Village of Dunkirk*, *supra*; *Lynes v. Martin*, 8 Ad. & El., 512. 4. That a municipal corporation cannot be made liable by ratification for an act of its agent which it did not possess the power to authorize the agent to perform. *Boom v. Utica*, *supra*; *Hodges v. Buffalo*, 2 Denio, 113. And in any case a ratification by a municipal corporation must be positively shown, and cannot be presumed. *Sherman v. City of Grenada*, *supra*; *Mayor, etc., v. Reynolds*, 20 Md., 14.

For the respondent it was argued, that the city is not exempted from liability by the fact that the warrant ran in the name of the state. An execution in justice's court runs in the name of the state, but the party directing its issue and an illegal levy is nevertheless liable. Nor is defendant's liability affected by the fact that the warrant did not direct a levy on this property. The act of the treasurer was within his general authority as an officer; and there is nothing to show that he did not act in good faith, "with an honest view to obtain for the public a lawful benefit," or to take the case out of the rule of *Hamilton v. Fond du Lac*, 40 Wis., 47; *Hurley v. Texas*, 20 id., 634; *Squiers v. Neenah*, 24 id., 588. The rule is well established in other states. *Thayer v. Boston*, 19 Pick., 511; *Howell v. Buffalo*, 15 N. Y., 512-20; *Conrad v. Ithaca*, 16 id., 158; *Weet v. Brockport*, id., 161-71; *Lee v. Sandy Hill*, 40 id., 442; *B. & H. Turnpike Co. v. Buffalo*, 58 id., 639; *Allen v. Decatur*, 23 Ill., 272; *McCombs v. Council*, 15 Ohio, 474; *Sheldon v. Kalamazoo*, 24 Mich., 383; *Wild v. New Orleans*, 12 La. An., 15; *Dillon on M. C.*, § 770; *Addison on Torts*, D. & B.'s ed., 1300. Moreover the city never returned the money, and, in some of the defenses set up in the answer, it alleges that the property was subject to the sale; and it must

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be held to have thus *ratified* the act. *Hamilton v. Fond du Lac, supra*; Dillon, §§ 69, 70.

LYON, J. Doubtless it has very frequently happened that municipal officers charged by law with the duty of collecting the public revenue have, for nonpayment of taxes, seized property belonging to persons not liable to pay such taxes. Many cases of tort, brought against such officers by the owners of property so seized, to recover damages therefor, are probably reported in the books; but we have been referred to no case, and upon most diligent search have been unable to find one, in which an action of tort for such unlawful seizure has been sustained or even commenced against a municipal corporation.

The absence of such cases raises a very strong presumption that the bar everywhere entertain the view that such actions cannot be maintained. This circumstance is not, however, conclusive of the question; for if a case like this comes clearly within the established doctrine of *respondeat superior*, the action must be upheld, notwithstanding the absence of cases directly in point.

To determine, therefore, whether this action can be maintained, resort must necessarily be had to the general principles of law relating to the liability of municipal corporations for the torts of their officers or agents.

That actions sounding in tort will lie in certain cases against municipal corporations, though formerly doubted, is now perfectly well settled. It is to be determined whether this is one of those cases.

The rules of law by which the question of the liability of the city of Menasha, in an action of tort for the unlawful seizure by its treasurer of the property of the plaintiff, is to be determined, are thus stated by Chief Justice SHAW in *Thayer v. The City of Boston*, 19 Pick., 511: "There is a large class of cases in which the rights of both the public and

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of individuals may be deeply involved, in which it cannot be known, at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful; still, if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by express vote of the city government or by the nature of the duties and functions with which they are charged by their offices, to act upon the general subject matter; and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage,—reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. . . .

“The court is therefore of opinion that the city of Boston may be liable in an action on the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where, after the act has been done, it has been ratified by the corporation, by any similar act of its officers. . . . As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*. It must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation.”

There is no pretense in the present case that the city of Menasha has ratified the unlawful act of its treasurer. True, the money realized on the sale of the plaintiff's property was paid into the city treasury in satisfaction of the tax assessed

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against Kelley & Co.; but it does not appear that the city council, or any officer of the city other than the treasurer, had notice of the source from which the money was derived, or did any act sanctioning or approving the seizure of the plaintiff's property.

Unlike the case of *Hurley v. Texas*, 20 Wis., 634, in which the levy was void, the taxes were lawfully assessed, and the warrant for the collection thereof lawfully issued to the treasurer by the mayor and city clerk under the seal of the city. The warrant commanded the treasurer, in case Kelley & Co. neglected or refused to pay the taxes assessed against them, to collect the same by distress and sale of *their* goods and chattels. It does not purport to give him authority to make such taxes out of the goods and chattels of the plaintiff or any person other than that firm. It was known and understood, when the plaintiff's goods were seized, that if they belonged to the plaintiff the seizure was unlawful. The treasurer had no authority, real or apparent, to make the seizure, and although he made it *colore officii*, and in the honest belief that the goods belonged to Kelley & Co., it cannot correctly be said that he had general authority to act for the city in that behalf. The treasurer had specific authority in a certain contingency to seize the goods of Kelley & Co., but he had no more authority to seize the goods of the plaintiff for the delinquent taxes of others, than he had to commit an assault and battery on a person taxed to compel him to pay his taxes. And, indeed, if the city is liable in the one case, it is not perceived why, on the same principle, it would not be liable in the other. Should the treasurer assault a tax debtor and take from his pocket by force the amount of his tax, it would hardly be claimed that the city is liable in tort for such unlawful and criminal acts.

The case of *Squiers v. Neenah*, 24 Wis., 588, cited and relied upon by counsel for the plaintiff, is distinguishable from the present case. The board of trustees of the village of

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Neenah attempted to lay a street through plaintiff's land, but, because of a defect in the village charter, no street was lawfully laid out. Believing, however, that it was lawfully established, the board ordered the street commissioners to open the street, and one of them opened it by removing the plaintiff's fences, against his protest. The action was trespass against the village to recover damages for the act of the street commissioner, and the plaintiff recovered. The unlawful act complained of was expressly directed by that branch of the village government invested by law with jurisdiction to act for the corporation in the matters of laying out and opening streets; and hence the case was clearly within the rule of municipal liability laid down in *Thayer v. Boston*, *supra*. That case is referred to and approved in the opinion by DIXON, C. J.; also in *Hurley v. Texas*, *supra*, and in *Hamilton v. Fond du Lac*, 40 Wis., 47. In the two cases last cited, as in *Squiers v. Neenah*, the unlawful acts complained of were done pursuant to express orders of the respective city councils.

Did the charter of Menasha authorize the city council to control and direct its treasurer specifically in the matter of collection of taxes, and had the council directed him to seize, or after seizure had it directed him to sell, the property of the plaintiff to satisfy the taxes of Kelley & Co., we should have a case more nearly resembling those above cited.

We have thus far considered the case upon the hypothesis that the treasurer is the agent or servant of the city, for whose torts the city may, in a proper case, be held liable. But, under the authorities, it may well be doubted whether the rule *respondet superior* has any application to acts performed or torts committed by him in the collection of taxes. The levy and collection of taxes are governmental rather than municipal functions, delegated, it is true, to municipal officers for convenience, but still governmental. It may well be claimed that, in the exercise of those functions, such officers are public officers, discharging public and not municipal or

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corporate duties. If so, there seems to be no ground for holding the municipality liable for their torts committed in the exercise of those functions—no room for the application of the rule *respondeat superior* in such cases. A distinction is made in many well considered cases between torts committed by municipal officers or agents in the discharge of such public duties, and those committed in the discharge of purely municipal or corporate duties by the officers or agents of the city or village; the municipality being held liable for the latter, but not liable for the former class of torts. In addition to the cases and authorities cited in the brief of counsel for the city, see 2 Dillon on Munic. Corp., §§ 464 to 770, inclusive, and cases cited; *Bailey v. Mayor, etc., of N. Y.*, 3 Hill, 531; *Oliver v. Worcester*, 102 Mass., 489. This distinction was recognized in *Hayes v. Oshkosh*, 33 Wis., 318, and controlled the judgment of the court.

We conclude that the city is not liable in this action for the tort of the treasurer. Whether the plaintiff can maintain an action, as for money had and received, to recover of the city the proceeds of the sale of his property, paid into the city treasury, or any part thereof, we do not determine.

By the Court.—Judgment reversed, and cause remanded with direction to the circuit court to render judgment for the defendant.

MEUSEL VS. SEMPLE.

December 17, 1879 — January 7, 1880.

(1) Evidence. (2) Reversal for error of fact.

1. In an action for contribution by one of two joint indorsers against the other, where the issue is, whether defendant, as well as plaintiff, and through plaintiff as his agent, waived presentment and notice, evidence of a promise by defendant to plaintiff, after the maturity of the note, to pay his share of it, may be received as bearing upon that issue.

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2. Where there was evidence which, uncontradicted, would support the verdict, and a new trial has been denied, this court (unless in an extreme case) will not reverse the judgment.

APPEAL from the Circuit Court for *Winnnebago* County.

The case is thus stated by Mr. Justice TAYLOR:

"The evidence in this case shows that the plaintiff and defendant both indorsed a note of James Semple (brother of the defendant), bearing date May 29, 1874, for the sum of \$1,500, payable to Joseph Kirkland or bearer, at the First National Bank of Oshkosh, four months after date, with interest at the rate of 10 per cent. per annum; and that at the time the note became due it was owned and held by one Joseph Klockner. It was admitted upon the trial that the indorsement was a joint indorsement by the defendant and plaintiff. It was also admitted that the note, when it became due, was not presented to the maker for payment, nor was any notice of the nonpayment of the same given to either of the indorsers. The plaintiff paid the note some time after it became due, and brings this suit to compel the defendant to pay one-half the amount of the money paid by him as his contributive share upon such joint indorsement."

Defendant appealed from a judgment for the plaintiff.

G. W. Washburn, for the appellant.

For the respondent, there was a brief by *Gabe Bouck*, and oral argument by *Charles W. Felker*.

TAYLOR, J. The plaintiff bases his claim to contribution upon the ground that he and the appellant, before the note became due, requested the holder not to present it for payment, and waived protest and notice of nonpayment.

The only issue made on the trial was, whether the appellant waived such protest and notice; the proof clearly showing that the respondent did waive such protest and notice, and requested the holder not to have the same protested or notice given.

The respondent testified that a few days before the note be-

came due, "the defendant told him he did not want the note protested; that as soon as his brother got better he would pay it;" and that he then saw the holder of the note, Klockner, and told him not to protest the note, and he did not. He also swears that after the note became due the appellant repeatedly promised to pay his share of the note, but put him off from time to time. The appellant swears that he had no conversation with the respondent about the note after it was indorsed, until some time after it became due; and denies that he ever told him he did not want the note protested, but admits that the respondent called on him after it became due, and wanted him to pay one-half of it; that he called on him repeatedly, and that he told him "he could not do anything for him then."

There was but one exception taken upon the trial, which was to the admission in evidence of the conversation between the plaintiff and defendant after the note became due, and in which plaintiff claims and testifies that the defendant said "he would not have it that the plaintiff should lose the whole, and I paid my share, and he promised to pay me."

There was no exception taken to the charge of the judge, and, from an examination of the same, the questions in issue seem to have been fairly submitted to the jury. The learned circuit judge instructed the jury, in substance, that the plaintiff could not recover unless they found from the evidence that the defendant waived protest of the note, and that, to find such waiver under the evidence, they must find that the defendant authorized the plaintiff to say to the holder of the note, on his behalf as well as on his own, that he should not protest it. Upon this evidence, fairly submitted, the jury found for the plaintiff.

The defendant moved to set aside the verdict, on the grounds that there was no evidence to support it, that it was against the weight of evidence, and that improper evidence was admitted on the trial. The motion was denied, and judgment entered, from which the defendant appeals.

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We do not think there was any error in admitting the evidence of the promise of the defendant to pay the plaintiff a portion of the amount of the note, made after the note became due. Although the action was not brought upon this promise, but upon the legal liability of the defendant to contribute to the payment of the note, upon the ground that both the joint indorsers had waived protest and notice of nonpayment, the objection being of the most general kind, the evidence was, we think, admissible upon the issue of the defendant's waiver of notice of protest before the note became due. Such promise would have been clearly admissible if the action had been between the holder of the note and the defendant, and the promise to pay had been made by the defendant to the holder, as some evidence tending to show that a notice of protest of the note had been waived by the defendant, as well as evidence tending to show that notice had been regularly given.

In the case of *Lundie v. Robinson*, 7 East, 235, Lord ELLENBOROUGH says: "When a man against whom there is a demand promises to pay it, for the necessary facilitating of business between man and man, everything must be presumed against him. It is therefore to be presumed *prima facie*, from the promise so made, that the bill had been presented for payment in due time and dishonored, and due notice thereof given to the defendant. But, taking the subsequent conversation as connected with the former, the only limitation of it would be that the defendant stated that he had not had regular notice of the dishonor; but even that objection was waived in the same breath, for the defendant said that as the debt was justly due he would pay it." In the case at bar, the defendant knew that he had not received any notice of protest, and, as he now claims, was not in law either bound to pay the holder of the note or contribute to his joint indorser, who was obligated to pay the same, unless he had waived notice of nonpayment; yet, when called upon by his joint indorser to contribute to the payment of the same, he promises to pay. This, under the

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rule above stated, would be evidence tending to show either that he had waived the notice of nonpayment before the note became due, or, if he had not so waived it, that he would pay his proportion notwithstanding the want of any previous waiver on his part. Such subsequent promise is, by most of the cases, considered a waiver of the right to the notice, and renders the indorser liable upon the indorsement, the same as though notice had in fact been given. *Sigerson v. Mathews*, 20 How., U. S., 496-500; Story on Promissory Notes, § 362 and notes.

But there is another view of this case which renders such promise clearly admissible. The plaintiff claimed that he was authorized, as the agent of the defendant, to waive protest of this note. Knowing that the plaintiff had waived such notice, he afterwards promises to pay, notwithstanding the want of notice. Clearly this evidence of a promise to pay is evidence tending to show that the plaintiff was in fact authorized to make such waiver on his behalf. His promise to pay is an acknowledgment on his part of the justice and legality of the claim made by the plaintiff; and in such acknowledgment of the legality of the claim there is an implied admission that the plaintiff was authorized to waive the notice of protest on the part of the defendant; for without such authority there could be no legal claim against him.

We think the charge of the learned circuit judge was sufficiently favorable to the defendant; and I think, if there is any complaint to be made against it, the plaintiff might with some show of justice complain that it did not give sufficient importance to the fact of the defendant's promise to pay the debt after the note became due. Upon the exact point submitted to the jury, viz., whether the defendant had, before the note became due, authorized the plaintiff to waive notice of protest for him, there was evidence on both sides; and, giving proper importance to the testimony relating to the defendant's subsequent promises to pay, we cannot even say the verdict is

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against the weight of evidence. But, however that may be, this court, upon an appeal, does not weigh and balance the evidence for the purpose of determining whether the verdict is on the side which, from the mere inspection of the written evidence, appears to preponderate.

When the evidence given on the part of the prevailing party is such that, if uncontradicted, it would entitle him to the verdict he has obtained, it would be an assumption of power on the part of this court, except in an extreme case, to overrule the judgment of the judge before whom the case was tried, that a new trial ought not to be granted. The judge who hears the witnesses, and fully understands all the facts attending the trial, who can perceive the coloring and shading of the testimony, and the bias or prejudices of the witnesses, is in a much more advantageous position for determining whether the verdict is unsustained by the evidence, than this court can possibly be from a mere inspection of the impersonal written record before it. There was clearly some evidence to sustain the verdict, and, the judge who tried the cause having expressed himself satisfied therewith, we cannot reverse the same.

By the Court.—The judgment of the circuit court is affirmed.

THE FIRE DEPARTMENT OF THE CITY OF OSHKOSH VS. TUTTLE.

December 17, 1879 — January 7, 1880.

Taxation of Insurance Companies — Implied repeal of statutes.

The general law regulating the payment by insurance companies doing business in any city or village of this state, of a tax consisting of two per cent. of their premiums (ch. 56 of 1870, amended by ch. 299 of 1873), operated to repeal all special provisions of city and village charters on that subject.

APPEAL from the Circuit Court for *Winnebago* County.

Plaintiff appealed from an order sustaining a demurrer to the complaint. The case is stated in the opinion.

48	91
90	375

The Fire Department of the City of Oshkosh vs. Tuttle.

H. B. Jackson, for the appellant.

The cause was submitted for the respondent on the brief of *Finch & Barber*.

ORTON, J. This action is brought against the defendant as the agent of certain foreign and domestic fire insurance companies doing business in the city of Oshkosh, to recover the two per cent. of premiums received for insurance under the provisions of chapter 56, Laws of 1870, as amended by chapter 299, Laws of 1873. By the charter of the city, found in chapter 501, P. & L. Laws of 1868, this tax is to be paid by foreign insurance companies only, and on premiums received on business done within the city, and to the city treasurer. The general law authorizes the tax to be paid to the treasurer of the fire department by the agents of both foreign and domestic fire insurance companies doing business in any city or village of the state.

The only question raised by the demurrer to the complaint is, whether these provisions of the general insurance law apply to and are in force in the city of Oshkosh, to the exclusion of the provisions of the city charter upon the same subject; or, in other words, whether the general law repeals these provisions of the city charter. The general law and the charter, in these respects, cannot stand together without imposing a double tax, and prescribing different and conflicting modes of collecting it. We think there is abundant reason for holding that all special provisions of city and village charters relating to this subject are repealed by the general law.

First. The general law upon this subject has application only to cities and villages; and as many, if not most, of the cities and villages of the state are incorporated, and have special provisions upon this subject, the general law could have but very limited force and effect if it did not repeal and supersede such special provisions.

Second. The general law embraces both foreign and do-

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mestic fire insurance companies, and imposes a tax upon all of the business done by their agents, both in and without the city or village.

Third. The general law prescribes a uniform tax and mode of collection, in place of the uncertain, partial and various provisions of city and village charters.

Fourth. All insurance companies, both foreign and domestic, may be presumed to have notice of the provisions of the general law, when such a presumption in respect to the various provisions of city and village charters might work injustice by surprise.

Fifth. The same objects, and to a fuller extent, are secured by the general law.

Sixth. Chapter 299, Laws of 1873, repeals all conflicting provisions.

Seventh. In addition to these apparent reasons of convenience, uniformity and public policy, the general law contains a full *revision* of the whole subject, and this alone would warrant the inference of a repeal of all conflicting provisions upon the same subject. *Lewis, Gov., v. Stout et al.*, 22 Wis., 234; *Oleson v. Green Bay & L. P. Railway Co. et al.*, 36 Wis., 383.

By the Court. — The order of the circuit court sustaining the demurrer to the complaint is reversed, with costs, and the cause remanded for further proceedings according to law.

 SHERRY VS. SCHRAAGE.

December 19, 1879 — January 7, 1880.

(1) MECHANIC'S LIEN: *Amendment of petition.* (2) Costs on appeal, where judgment affirmed in part.

1. Where one entitled to a mechanic's lien has in good faith filed a petition in time, but, through mistake, it is imperfect (as where it describes the

48	98
78	277
48	93
94	324

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premises incorrectly), the court in which suit is brought to enforce the lien may permit an *amendment* of the petition, as against all persons who have not in the meantime acquired vested rights in respect to the premises. R. S., secs. 3320, 4980.

2. Plaintiff appealed from the whole judgment, although a part thereof was in his favor; and, on affirming the judgment as to that part and reversing it as to the remainder, it not appearing that defendant was injured by the form of the appeal, this court, in the exercise of its discretion (R. S., sec. 2949), awards costs to the appellant.

APPEAL from the Circuit Court for *Fond du Lac* County.

The cause is thus stated by Mr. Justice TAYLOR:

"This action was commenced to recover of the defendant the value of a quantity of lumber sold by the plaintiff to him, and used by him in the erection of a store building on the lots described in the complaint, situate in the village of Calvary, in Fond du Lac county, and to have the amount of the value of such lumber declared a lien upon the store and lots therein described. The complaint alleged the filing of a petition for lien within the time prescribed by law, and also alleged that in such petition the plaintiff had made a mistake in the description of the lands upon which the building was situate, and asked to have the petition amended so as to make the same correspond with the description of the property set out in the complaint, which was the true description. The defendant answered by a general denial. Upon the trial, the plaintiff proved the sale and delivery of the lumber to the defendant; the value thereof; that no part of such value had been paid; that the lumber was used by the defendant in the construction of a store building on the lots described in the complaint; that such building and lots were owned by the defendant, and were so owned at the time the building was erected; and that no liens by judgment, mortgage or otherwise had been placed upon said store or the lots on which the same was situated, between the time of the filing of the petition for a lien and the date of the filing of the *lis pendens* in this action.

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"The plaintiff also offered in evidence the original petition for a lien. The land described in the petition as that upon which the building was situated, was not the land described in the complaint, upon which it was in fact situated, but was in another section and about a mile or more distant therefrom.

"Upon this evidence the court refused to permit the plaintiff to amend his petition for a lien so as to correctly describe the land upon which the building in the erection of which plaintiff's lumber had been used was situated, and rendered a personal judgment in favor of the plaintiff against the defendant for the value of the lumber, with costs of the action, and 'further adjudged that the prayer of the plaintiff for leave to amend the petition for a lien, and for judgment of lien against the premises described in the complaint, be denied.' The action was tried by the court, and, upon finding the facts as above stated, the judge held as a conclusion of law, 'that the petition for a mechanic's lien cannot be amended by correcting an error in the description of the property, notwithstanding there may have been no deeds, mortgages, petitions for liens, attachments, judgments, or any liens of any nature placed upon said property, and the defendant continued to hold and own the same from the date of the filing of the petition for a lien to the date of the filing the *lis pendens*, and the service and filing of the summons and complaint.'

"To this conclusion of law the plaintiff duly excepted, and, judgment having been entered in conformity thereto, he appeals to this court and asks for a reversal of that part of the judgment which denies to him the right to amend his petition for a lien and to have a judgment declaring the amount due him for the lumber, with the costs, a lien against the building and the lands upon which the same is situated."

Elihu Colman, for the appellant, in support of the right to amend the petition, cited sec. 2830, R. S.; *Witte v. Meyer*, 11 Wis., 295; *Brown v. La Crosse Gas Light Co.*, 16 id., 555; *McCoy v. Quick*, 30 id., 521; *Nary v. Henni*, 45 id., 473.

Sherry vs. Schraage.

The cause was submitted for the respondent on the brief of *George P. Knowles*:

The time for filing the petition for a lien expired on the 24th of January, 1878; and the action was not commenced until the 13th of the following month. In the description contained in the petition actually filed, there is nothing in any way relating to the description now asked to be substituted. That petition is a nullity; and if an amendment should now be allowed, it would amount to an entirely new proceeding after the expiration of the time limited by law. *Witte v. Meyer*, 11 Wis., 300.

TAYLOR, J. The case presents the question of the power of the court to direct an amendment of a petition for a lien, in the matter of the description of the property upon which the lien is claimed, when a mistake in such description has been made in such petition, and in a case where no rights are to be affected except those of the defendant. The court below denied the right absolutely and without qualification.

This question has been twice before this court (*Brown v. La Crosse Gas Light Co.*, 16 Wis., 555, and *McCoy v. Quick*, 30 Wis., 521); but in both cases the judgment of this court went upon other grounds, and left this question undecided. In *Witte v. Meyer*, 11 Wis., 296, this court decided that the petition was a "proceeding" to continue and enforce a lien, and therefore came within the statute of amendments, and that an amendment of the petition as to the name of the petitioner was allowable.

In 1869 the legislature passed an act expressly allowing the petition in a lien case to be amended as to the name of the owner, where the real owner was the husband or wife of the party described in the petition and action; and the revision of 1878, which was in force when this action was tried, expressly provides that after action commenced in a lien case, the petition may be amended, by order of the court, in the same man-

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ner as pleadings in the action. See section 3320, R. S. 1878. And this provision of the revision was undoubtedly applicable to this case under the provisions of section 4980.

The legislative action upon this subject clearly indicates that a liberal rule should be applied to actions of this kind for the purpose of preserving the rights of the claimant for a lien.

The filing of the petition is, in the language of the court in the case of *Witte v. Meyer, supra*, a "proceeding" to continue the lien. The lien is not created by the filing of such petition, but by the fact of doing the work or furnishing the materials in the construction of the building to which the lien attaches. The filing of the petition within a limited time is mainly for the purpose of giving notice to third persons who, without such notice, might be inclined to take other liens upon the property or to purchase the same. It is undoubtedly true that, as the right of lien and the manner of enforcing the same are purely statutory, the neglect of the plaintiff to file his petition within the time prescribed would be fatal to his right to enforce it; but when he has in good faith filed his petition within the time prescribed by law, and by mistake has failed to file a perfect petition, as against all persons who have not acquired vested rights by reason of the want of such perfect petition, it would seem but a just exercise of the powers of the court to permit such petition to be amended so as to make the record perfect. The defendant knew, when he purchased the lumber and used it in the erection of his building, that the law gave his vendor a lien upon his building, and the lands on which it was situated, for the value of the same, and that such lien would continue for one year, and no longer, unless within the year an action for the recovery of the purchase price was commenced for the enforcement of such lien.

In this case the action was commenced within the year, and a petition was filed within the six months prescribed by

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the statute. There can be no pretense, therefore, that the defendant has been misled by the action of the plaintiff. The petition, though imperfect, was notice to him that the plaintiff was intending to enforce his lien. He knew, by the other matters contained in such petition, that the plaintiff intended to continue his lien upon the store building and the lands on which it was situated, notwithstanding the misdescription therein. The rights of no other parties intervening, there does not appear to be any good reason for refusing the amendment as prayed for by the plaintiff in his complaint, and enforcing his lien by the judgment of the court. We are clearly of the opinion that the amendment in this case would, under the circumstances disclosed, have been in furtherance of justice, and should have been allowed by the court.

The judgment of the court below having expressly denied the plaintiff's right to amend his petition for a lien, and denied him a judgment declaring his claim a lien upon the property described in the complaint, the better practice for the appellant would have been to appeal from that part of the judgment denying his right of amendment and a lien judgment, instead of from the whole judgment. The personal judgment in favor of the appellant is clearly not erroneous, as such judgment would be entered in his favor although a judgment declaring the same a lien upon the premises described in the complaint had also been entered in his favor.

The plaintiff having appealed from the whole judgment, that part of the judgment of the circuit court which adjudges that the plaintiff recover of the defendant the sum of \$353.80 with \$44.37 costs, must be affirmed, and that part which denies the plaintiff the right to amend his petition for a lien, and denies a judgment lien against the premises described in the complaint, reversed; and the cause must be remanded with directions to allow the amendment and enter judgment in favor of the plaintiff establishing his lien, and for the enforcement thereof, as prayed in his complaint.

Benham vs. Purdy.

The judgment being affirmed in part and reversed in part, the costs on this appeal, under the provisions of section 2949, R. S. 1878, are in the discretion of the court. As it does not appear that the respondent has been in any way prejudiced by the appeal from that part of the judgment which is affirmed, we think the appellant should have costs.

By the Court.— Ordered accordingly.

BENHAM vs. PURDY.

December 19, 1879 — January 7, 1880.

(1) *Deposition: waiver of notice.* (2) *Court and jury.*

1. A failure to serve on a party notice of the taking of a deposition is waived by his joining in the commission and submitting cross interrogatories.
2. Where the evidence is conflicting and would support a verdict either way, it is error to instruct the jury to return a verdict for the plaintiff.

APPEAL from the Circuit Court for *Fond du Lac* County.

Action for a sum of money alleged to have been collected by defendant upon a promissory note belonging to plaintiff, and converted by defendant to his own use. The answer denies plaintiff's ownership of the note at the commencement of the action, and alleges that one Squires was the true owner thereof, and that defendant had paid him the amount collected thereon.

At the trial, defendant objected to the admission in evidence of certain depositions, on the ground that there had been no service on his attorneys of any notice of the taking of such depositions or of the affidavit on which they were founded, and that there was no certificate attached to the depositions, showing when they were taken. The objection was overruled.

At the close of the evidence, the court directed the jury to find a verdict for the plaintiff for a certain sum, and they

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found accordingly. From a judgment pursuant to the verdict, defendant appealed.

Elihu Colman, for the appellant.

George W. Carter, for the respondent.

ORTON, J. The objection of the appellant to the depositions for the want of notice was waived by his joining in the commission and submitting cross interrogatories (*Miller v. McDonald*, 13 Wis., 673; *Cameron v. Cameron et al.*, 15 Wis., 1); and the certificate of the commissioner appears to be sufficient.

The facts of this case, and undisputed, appear to be, that the appellant and one Squires were copartners, and as such held a note for the sum of \$298 against the firm of Carney Bros., of the state of Michigan, which was in the hands of one Adams, of said state, for collection; that upon the dissolution of the copartnership this note was assigned to Squires; and that the money collected by Adams on the note was sent by him to the appellant. The respondent claims that he purchased the note for value and took an assignment of it before its collection from Squires, and has demanded the money as the proceeds thereof from the appellant. The appellant denies these allegations, and claims that Squires was the owner of the note and the proceeds thereof, and that he had applied the same in liquidation of a certain demand he held against Squires.

The learned circuit judge held, in answer to an inquiry of counsel, "that the defense set up in the answer turns upon the ownership of the note," which was strictly correct, and this seems to have been the material question in the case.

We think there was testimony given upon this question tending strongly to show that Squires was the real owner of the note and moneys, and not the respondent, which ought to have been submitted to the jury. The appellant and the witness J. H. Hanser, Esq., both testified that the respondent

Johannes, County Judge, vs. Youngs and others.

admitted to them, respectively, that Squires was the owner of the note.

To say the least of it, there was a direct conflict of evidence, and a question of the credibility of witnesses and of the weight of testimony, of which the jury were the exclusive judges. *Morrow v. Delansy*, 41 Wis., 149.

To warrant the court to direct a verdict for either party, there should be no doubt about the evidence. Directing a verdict to be rendered *for* the plaintiff should rest upon the same principles as directing a nonsuit (*Cutler v. Hurlbut et al.*, 29 Wis., 152); and the rule in such case is not to grant a nonsuit unless the plaintiff has clearly failed to make out a case, or when the testimony is conflicting and would sustain a verdict either way. *Grasse et ux. v. Mil., L. S. & W. Railroad Co.*, 36 Wis., 582. A nonsuit should be ordered only when there is an entire want of evidence which, on the most favorable construction, tends to establish the plaintiff's case. *Imhoff v. Ch. & Mil. Railroad Co.*, 22 Wis., 631. Tested by these rules, the circuit court clearly erred in directing a verdict for the plaintiff in this case.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

JOHANNES, County Judge, vs. YOUNGS and others.

December 19, 1879 — January 7, 1880.

LEAVE TO SUE administrator's bond. (1) Objection to be taken by special plea. (2) Leave held sufficient in this case; (3) and its scope explained. (4) Power of county judge to revoke; when alleged revocation waived. (5) Query as to form of judgment for breach of such bond.

1. The objection that leave to sue an administrator's bond has not been obtained, must be taken by special plea in abatement.
2. A petition having been presented to the probate court for leave to sue an administrator's bond, the judge indorsed upon a certified copy of such

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bond an order or certificate reciting that it appeared to his satisfaction that the petitioner was a creditor of the estate, and that the administrator had neglected to file an inventory or to render an account as required by law (these being the facts alleged in the petition), and that, on the petitioner's request, he authorized an action to be brought on the bond. *Held*, a sufficiently formal authority.

3. The authority thus granted was for an action under sec. 4 (and not sec. 2), ch. 104, R. S. 1858.
4. Even if the county judge could revoke such an authority after suit commenced, the objection that he had done so cannot be taken after going to trial on a plea in bar.
5. Whether, under the present revised statutes, the judgment against the administrator, for a breach of his bond, should be for the penalty therein named, *quære*.

APPEAL from the Circuit Court for *Kewaunee* County.

This action was brought in the name of the county judge of Kewaunee county, upon the general administration bond executed by three of the defendants as administrators of the estate of David Youngs, deceased, and by the other defendants as sureties. The answer was a general denial. After evidence offered by the parties had been received, defendants were allowed to amend the answer, in accordance with evidence introduced by them against objection, so as further to allege that after the date of the alleged certificate and order of the county judge allowing the suit to be brought, and after service of the original answer herein, the county judge duly revoked said pretended certificate and order. Afterwards the jury, by direction of the court, returned a verdict for the defendants. The grounds upon which this direction of the court was given, are stated in the opinion. From a judgment pursuant to the verdict, plaintiff appealed.

G. G. Sedgwick and *Wm. F. Vilas*, for the appellant.

For the respondents, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*.

COLE, J. The circuit court directed the jury to find a verdict in favor of the defendants. The grounds or reasons for

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this direction, as stated in the bill of exceptions, are: *first*, that there was no such authority to bring the action granted by the county judge, as is required by the statute; *second*, that if authority was granted, it was authority to bring the action under section 2, ch. 104, Tay. Stats., while the action is in fact brought under section 4 of that chapter; and *third*, that the authority was not granted to a creditor of the estate, within the meaning of the statute.

In regard to the first reason assigned for the ruling of the court below, the counsel for the plaintiff give, as it appears to us, two very satisfactory answers. *First*, they contend that the objection that permission or leave was not given by the county judge to prosecute the bond, was only matter in abatement, not in bar to the action, and must be specially pleaded in the answer to be available; and they rely upon the decisions in *Dutcher v. Dutcher*, 39 Wis., 651; *Board of Supervisors v. Van Stralen*, 45 Wis., 675, in support of this position. It is most favorable to the defendants to adopt that view, and to hold that the objection of want of authority to sue the bond is in the nature of a plea in abatement, and that, to entitle a party to the benefit of such a defense, he must specially set it up in his answer at the proper stage of the cause. Here there was a general denial only, raising the question as to the liability of the defendants, and not putting in issue the question whether proper authority had been given to prosecute the bond. And *secondly*, counsel insist that the evidence produced on the trial shows that leave or permission was granted by the county judge to prosecute the bond, before action was brought upon it. The evidence upon that point shows that application by petition was made to the probate court by Mr. Dickey, representing that he was a creditor of the estate, and that the administrators had neglected and failed to make and file an inventory of the estate, and had failed and neglected to render an account as required by law, and asking that leave be granted to bring an action on the bond.

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On the back of a certified copy of the bond, the county judge made an order or certificate, stating, in substance, that it appeared to his satisfaction that Dickey was a creditor of the estate; that the administrators had failed to make and file an inventory of the estate, and render an account within a year from the date of their appointment; and that he, therefore, on request of Dickey, authorized an action to be brought on the bond. It seems to us that this order granting leave to sue the bond was sufficiently formal to meet the requirements of the statute. The order was in writing, signed by the county judge, and was certainly evidence of authority to sue. Perhaps this is a more liberal rule than the one adopted in Massachusetts on this subject, though, in the leading case of *Fay, Judge, v. Rogers' Administrator, etc.*, 2 Gray, 175, it is admitted that no application was made in writing to the judge of probate asking authority to sue; and there was no record or memorandum in writing, in the probate office or elsewhere, to show that any such authority was given, the only authority to sue being a verbal one. The defendants in their answer seasonably took the objection, that the party prosecuting the suit had no authority to institute it. The court sustained the objection, holding that a verbal authority to sue was not sufficient. It is manifest at a glance that that case presented a different question from the one arising upon this record.

The next reason assigned for the direction is, that, if authority was granted, it was authority to bring the action under sec. 2, ch. 104, while the action in fact was brought under section 4 of the chapter. This view is distinctly negatived by the terms of the order itself, and by the decision of this court on the former appeal. 45 Wis., 445. It was there held that the action was under section 4, for the benefit of all persons interested in the estate; the averment in the complaint that it was for the use of Mr. Dickey being treated as surplusage. This is all we deem it necessary to say in order to point out the error of the court below in directing a verdict for the defendants.

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The point is made in the brief of counsel for the defendants, that the evidence on the trial showed that the permission to sue the bond was revoked by the county judge after this action was commenced. It must be obvious from what has already been said, that it was improper to raise any such issue after pleading in bar to the action and going to trial of the cause upon the merits. Besides, the evidence entirely fails to sustain the position of counsel, conceding that the county judge could revoke the authority granted after an action had been commenced for a breach of the bond.

The counsel for the plaintiff ask that the cause be remanded with directions to enter judgment for the plaintiff for the penalty of the bond. That would be the form of the judgment, undoubtedly, at common law; but the question whether or no the rule has been changed by the present revision is important, and was not discussed upon the argument. We do not, therefore, feel like expressing an opinion as to the proper form of the judgment at this time.

By the Court. — The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

WELLAUER and another vs. FELLOWS.

December 20, 1879 — January 7, 1880.

SALE OF GOODS. (1) *When receiver of goods cannot disclaim purchase.*
(2) *"Terms Cash," on unreceipted bill.*

1. One who receives goods sent to him, knowing that the sender claims that the receiver has purchased them of him, cannot, in the absence of mistake or fraud, appropriate them to his own use, and then disclaim the purchase.
2. The word "Terms Cash" upon an unreceipted bill of goods sent by a wholesale to a retail dealer, cannot be held, as matter of law, to imply that the goods were paid for before they were shipped.

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APPEAL from the Circuit Court for *Kewaunee* County.

The case is thus stated by Mr. Justice TAYLOR:

"This is an action to recover for the balance due the appellants [plaintiffs] on account for goods sold and delivered by them to the respondent.

"The evidence on the part of the appellants showed that they were wholesale grocers in the city of Milwaukee, and the respondent a merchant of Ahnapee, in the county of Kewaunee, and that, at the request of one Vader, a commission man in the city of Milwaukee, with whom the respondent had dealings, the appellants shipped to the respondent, between the first of January, 1876, and February 25th of the same year, goods of the value of \$286.87. The appellants, as directed by said Vader, charged the goods on their books to the respondent.

"The bills accompanying the goods sent to respondent were all in substantially the following form:

'MILWAUKEE, January 5, 1876.

'*Mr. C. L. Fellows, Ahnapee,*

'Bought of JACOB WELLAUER,

'IMPORTER AND WHOLESALE DEALER IN CHEESE, GROCERIES,
'ETC., 479 and 499 East Water Street.

'Terms Cash.

'Forwarded, for your account and risk, by schooner St. Lawrence, Captain August Schunerman:'

"[Here follows a statement of articles sold, and price of same.]

"There were three bills of goods sent. On the 24th of February, 1876, when the last bill of goods was sent, Vader paid on the account, for the respondent, the sum of \$130. The proof clearly showed that the bills for the goods were received by the respondent at or about the time the goods were; that respondent kept the goods, and sold them as his own; that he never notified the appellants that he had not ordered the goods, nor that Vader was not authorized to order them on his account; that appellants sent him two statements of their

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account against him, and requested payment of the same; and that no attention was given to the matter by the respondent, until the 20th of June, 1876, after the appellants had drawn upon him for the balance of their account.

"In his letter of that date he denied that he had ever ordered any goods of the appellants, or given Vader any authority to order them on his account; claimed that he had a receipt from Vader showing payment in full for the goods sold; and further claimed that the bills for the goods were all made out to Vader. On the trial, no such receipts were shown by the respondent and the bills produced by him showed that the statement in his letter that the bills were made out to Vader, was false. The plaintiffs also showed that the goods were shipped to respondent, and on his account.

"Some evidence was given by the appellant as to the meaning of the words 'Terms Cash' as used in the bills. The explanation was, that upon such bills it was expected that the goods would be paid for on delivery, or within 30 days thereafter. None of the bills were receipted. The evidence further showed that when the goods were sold *Jacob Wellauer* was doing business alone, but that before the commencement of this action *John Hoffman* had become his partner in business, and that the account belonged to the firm.

"Upon this evidence the plaintiffs were nonsuited; and they appealed from the judgment."

For the appellants, there was a brief by *G. G. Sedgwick*, and oral argument by *Mr. Sedgwick* and *Wm. F. Vilas*.

For the respondent, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*.

TAYLOR, J. We are very clear that the court erred in directing a nonsuit in this case. It seems to us that there was not only evidence to carry the case to the jury, but that, unexplained, there was evidence upon which the jury must have found for the plaintiffs. The court seems to have labored

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under the impression, that, because the defendant denied in his letter, written long after the goods were received, the authority of Vader to purchase goods upon his account, except for cash, the plaintiffs had made out no cause of action against the defendant. This letter was an unsworn statement of the defendant in his own favor, made after the goods were delivered and used by him, and should have very little weight in determining the question of the agency of Vader.

There certainly was some evidence to go to the jury upon the question of the authority of Vader to order the goods for the defendant, and upon that point the case should have been submitted to the jury; but, whether the agency of Vader was proved or not, there was abundance of evidence tending to show that the respondent bought the goods of the appellants. Leaving out of view altogether the fact that the goods were sent to the respondent at the request of Vader, the evidence was sufficient to have sustained a verdict in favor of the appellants.

The goods were sent by the appellants to the respondent, accompanied with a statement that he had bought the goods of them for a stated price, which price they expected him to pay either on the receipt of the goods or within thirty days thereafter. This is the fair construction of the bills sent with the goods. The respondent received the goods upon this statement without objection, and converted them to his own use.

After doing this, he is estopped from insisting that he did not buy the goods. He was notified that the appellants, who sent the goods, supposed they were selling them to him, and that they expected him to pay for them. If he did not intend to receive the goods as purchased by him of the appellants, he should have refused to receive them; but, having received them without objection, there would be no justice in permitting him to say afterwards that he did not buy them, and would not, therefore, pay for them. The only excuse the de-

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defendant himself makes for his refusal to pay for them, is that he supposed they were paid for by Vader, and the false excuse that the goods were billed to Vader. On the argument, some stress was laid upon the words, "Terms Cash," in the bills. It is said that these words in the bills implied that the goods were paid for before they were shipped to the defendant. The proof, however, shows that such is not the meaning of the words; and the fact that the bills, when received by the defendant, were not receipted "paid," must have advised the defendant that they were not in fact paid for when shipped to him. Had the goods been paid for by Vader or any other person, the bills would, undoubtedly, have been receipted. The respondent had no reason, upon the face of the bills, to suppose the goods had been paid for; and, having received the goods as sold to him, and converted the same to his own use, justice demands that he should pay for them, though they had never been ordered by himself or any other person on his account.

The facts of this case present a much stronger case in favor of the plaintiffs than the case of *Cooper v. Schwartz*, 40 Wis., 54, in which this court held that, upon the evidence offered, the question of the purchase by the defendant should have been submitted to the jury.

The defendant having received the goods from the plaintiffs, upon their claim that he had purchased from them, cannot, in the absence of mistake or fraud, appropriate them to his own use, and then disclaim the purchase. *Ballston Spa Bank v. Marine Bank*, 16 Wis., 120; *Paine v. Wilcox*, 16 Wis., 202-217; *Beal v. Ins. Co.*, 16 Wis., 241.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Nichols, Administratrix, vs. Palmer and another.

NICHOLS, Administratrix, vs. PALMER and another.

December 20, 1879 — January 7, 1880.

Discharge of Surety.

1. A surety for the performance of a contract is discharged by any subsequent material change therein.
2. Thus, where, during the life of a lease for three years, an agreement was entered into by lessor and lessee, by which the latter was to surrender the premises at the end of the second year, and pay certain sums, etc., in full of all rent due under the lease: *Held*, that a surety for the performance, by the lessee, of the original lease was discharged by such agreement.

APPEAL from the Circuit Court for *Manitowoc* County.

On the 15th of October, 1875, plaintiff, as administratrix of Lemuel P. Nichols, deceased, executed a lease to the defendant *Palmer* of certain lands belonging to said estate, for a term of three years from said date, at an annual rental of \$225, of which \$50 were to be paid in improvements, and the remainder in two cash installments each year. The first cash installment was to be paid November 10, 1875; the second October 16, 1876; and others on corresponding days of the successive years. *Palmer* executed a bond for the performance of the covenants of the lease on his part, with his codefendant *Vanderlip* as surety. On the 19th of April, 1877, plaintiff and *Palmer* executed certain articles of agreement, by the terms of which *Palmer* agrees to surrender possession of the premises by October 15, 1877, and also to pay plaintiff \$125, and "give her the same cow she left him, sheep and pigs in proportion as though his time had expired, and that sum is to include all parcels of rent whatever might be. He will also allow any parties whom she may designate to commence plowing as soon as his crops are taken from the field."

Afterwards (but the printed case does not show when), plaintiff brought this action on the bond, for \$50, balance of rent alleged to have become due November 10, 1877, with

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Nichols, Administratrix, vs. Palmer and another.

interest. As a witness in her own behalf she testified that \$75 had been paid her on this last agreement, after October 15, 1877, and the remainder of the \$125 was still due.

On defendants' motion the court ordered a nonsuit; and plaintiff appealed from the judgment.

For the appellant, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*.

For the respondents, the cause was submitted on the brief of *Henry Sibree*.

ORTON, J. It is clearly apparent, from the transaction itself, that the respondent *Vanderlip* was a mere surety on the bond conditioned for the performance of the terms of the lease on the part of the respondent *Palmer*. His liability, therefore, was *strict*, and depended *exclusively* upon the failure of *Palmer* to perform the conditions of the lease. It is also apparent that the lease, as such, although not formally surrendered or discharged, had been fully discharged and superseded by a new agreement between the appellant and *Palmer*, entered into April 19, 1877, which was the result of a full settlement of all the matters of the lease, and the consideration of the surrender of the leasehold estate one year before the time fixed by the lease, and constituted a new and independent agreement, for the performance of which *Vanderlip* is not in any way bound.

By every reason, and by all of the authorities, under such circumstances, *Vanderlip* was discharged from all liability as surety on the bond by the material alteration of its conditions by this new agreement; and it is self-evident that he never made himself liable by reason of *Palmer's* default in not complying with the terms of an agreement not mentioned in or contemplated by the bond.

"The obligation of a surety on a bond is *strictissimi juris*, and nothing can be taken against him by inference or intentment." *Smith v. Lockwood*, 34 Wis., 72.

The State ex rel. Mulholland vs. The County Clerk of Manitowoc County.

In *Sage v. Strong*, 40 Wis., 575, Mr. Justice LYON, in his opinion, says: "The rule is elementary, and of almost universal application, that a surety for the performance of a contract or obligation is discharged if such contract or obligation be materially changed without his consent." It is needless to multiply authorities after this decision, and in a case perfectly parallel in principle to this. Without considering other reasons, we think, from this view of the case alone, the nonsuit was properly granted.

By the Court.—The judgment of the circuit court is affirmed, with costs.

THE STATE ex rel. MULHOLLAND vs. THE COUNTY CLERK OF
MANITOWOC COUNTY.

December 20, 1879 — January 7, 1880.

MANDAMUS. (1) *Only one judgment for relator—for writ and costs.*
(2) *When the writ will not issue.*

1. After judgment (or order) awarding a peremptory *mandamus*, a separate judgment, in form, was entered for costs in favor of the relator; and the defendant appealed from the first-named judgment or order, and afterwards "from the whole judgment." *Held*, that there was in fact but a single judgment, awarding the writ with costs; and the first appeal is dismissed.
2. The county clerk has no legal authority to issue county orders except by express direction of the board of supervisors, by a "recorded vote" to that effect; and *mandamus* will not lie to compel him to issue them without such direction.

APPEAL from the Circuit Court for *Manitowoc* County.

The relator, the sheriff of Manitowoc county, presented for allowance certain accounts against said county to the board of supervisors thereof, at the annual session of the board in 1877. The board allowed the same at their face on the 15th of November in that year. During the same month, the county clerk, without any direction from the board, issued

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The State ex rel. Mulholland vs. The County Clerk of Manitowoc County.

county orders to the relator for the amount thus allowed, and the county treasurer paid such orders.

On the 21st of the same month, the board of supervisors reconsidered its action allowing the relator's accounts, and during the same session, on the first of December following, disallowed \$193.62 thereof, and allowed the balance. At the same time, the board directed that county orders be issued for such balance; and, the relator having received the full amount of his claim, the board afterwards directed the district attorney to bring an action against him to recover the amount thus disallowed. No such action has been commenced.

At a special meeting of the board held in May, 1878, the relator presented other accounts for allowance, and these were duly allowed at \$412.65. At the same time, the board, by resolution, directed that the said \$193.62, and interest thereon, be deducted from the sum thus allowed, and that county orders be issued to the relator for the residue only. At the same meeting in May, and after the above action had been taken on the relator's accounts, the board resolved "that the chairman and clerk of this board be authorized to issue county orders to the several persons to whom claims have been allowed, in accordance with the action of this board during its present session." This was the last act of the board before it adjourned.

The county clerk obeyed the special direction of the board, and refused, on the demand of the relator, to issue orders for \$200.29 of the sums thus allowed.

The relator sued out an alternative writ of *mandamus*, directed to the county clerk, commanding him to issue county orders for the sum last above named, or show cause to the contrary. The clerk made return thereto, and an issue was formed and tried, which resulted in a finding of the foregoing facts by the circuit judge. The judge's conclusions of law therefrom were, that the relator was entitled to a peremptory writ of *mandamus*, as prayed, and also to recover costs against the respondent therein, the county clerk.

The State ex rel. Mulholland vs. The County Clerk of Manitowoc County.

The judge signed a judgment or order awarding a peremptory writ, and at the same time signed separately a judgment for costs against said respondent. Both were duly entered.

The clerk first appealed from the judgment awarding the peremptory writ, and afterwards appealed from the whole judgment.

For the appellant, there was a brief by *Nash & Schmitz*, and oral argument by *L. J. Nash*.

For the respondent, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*.

LYON, J. The two judgments in form, although separately signed by the judge, are in substance and effect but one judgment, and but one appeal therefrom will lie. We must therefore dismiss one of these appeals. *Young v. Groner*, 22 Wis., 205; *Mead v. Walker*, 20 Wis., 518. The judgment really is, that a peremptory *mandamus* issue to the appellant, with costs to be taxed against him. Upon the appeal from the whole judgment we must necessarily review that portion which awards a peremptory writ of *mandamus*; and the first appeal, which is confined to that portion of the judgment, is therefore superfluous.

On the merits of the case, the controlling question is: Has the county clerk power, and is it his duty, to issue the county orders which the relator seeks in this proceeding to compel him to issue? The question is easily answered. When the clerk refused to issue the orders demanded, the law was that "such clerk shall not sign or issue any county order except upon a recorded vote of the board of supervisors authorizing the same." R. S. 1858, ch. 13, sec. 59 (Tay. Stats., 308, § 85). Such is still the law. R. S., 249, sec. 709, subd. 3. See, also, Tay. Stats., 297, § 35, subd. 2; id., 301, § 49; R. S., 244, sec. 686. In the present case, not only was there no vote of the board of supervisors authorizing the clerk to issue the orders demanded by the relator, but he was expressly directed by the

Smith vs. Ford.

board not to do so. It is manifest that, had he issued the orders, he ~~would~~ have violated a positive provision of law.

The signing and ~~issuing~~ of county orders by the clerk, when authorized by the board of supervisors, is purely a ministerial duty. *State ex rel. Treat v. Richter*, 37 Wis., 275. Unless he has such authority, he cannot lawfully sign and issue them, and a *mandamus* to compel him to do so will not be granted.

It is scarcely necessary to add that the resolution of the board at the close of the May meeting, authorizing the chairman and clerk "to issue county orders to the several persons to whom claims were allowed, in accordance with the action of the board" at that meeting, was not a direction to issue orders to the relator for the full amount of his claim allowed by the board. The special direction given in his case was not affected by the resolution, and orders were issued to him "in accordance with the action of the board."

We do not determine on these appeals what is the remedy of the relator, if he has a valid claim against the county; we only determine that on the case made by the record before us he has no remedy by a proceeding against the county clerk.

The appeal from the order awarding a peremptory writ of *mandamus* is dismissed.

On the appeal from the whole judgment, the judgment must be reversed, and the cause will be remanded with directions to the circuit court to dismiss the proceedings with costs.

By the Court.— So ordered.

SMITH VS. FORD.

August 29, 1878—February 3, 1880.

EQUITY: TRUSTS: CREDITOR'S SUIT: FORECLOSURE: SALES UNDER INDEPENDENT JUDGMENTS. (1) *Deed of trust construed: its validity and effect.* (2) *Who bound by decree in equity.* (3, 4) *Case stated.* (5, 6) *Foreclosure of mortgage; when persons named defendants cannot be*

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compelled to litigate therein the validity of the mortgage. (7-9) Sales of land on independent judgments; rights of respective purchasers.

TAX TITLE. (10, 11) *Effect of adverse possession of the whole or a part of the land. (12) What lands not taxable separately.*

DEED CONSTRUED. (13) *When deed of lot on navigable stream does not convey the land under the water.*

1. By a deed of trust (purporting to be made in pursuance of an ante-nuptial contract therein recited), A. and his wife, B., assigned and conveyed to X. all the personal and real estate which B. had at the time of her marriage or at the date of the deed, etc., in trust, as to the personalty, to invest the same at his discretion, receive the income thereof during the joint lives of A. and B., and pay the same to B. and her assignees, with power in B., by an instrument in writing, etc., to direct X. to dispose of such personal property according to her appointment, etc., etc.; and in trust as to the realty, to hold it and pay the rents, issues and profits to B. during the joint lives of A. and B., or to such persons as she might appoint, and to convey any part of said realty to such person as she should appoint, etc. If B. should survive A., the trustee was to convey, assign and transfer all the property to her, in the absence of any other appointment by her; and if she should die before A., the trustee was to convey, assign and transfer all the property to such persons as she might have appointed by her last will, or, in default of such appointment, was to assign and transfer the personalty to her next of kin, and convey the realty to her heirs-at-law. *Held*, that the trust thus created is an *active* one, and valid under subd. 5, sec. 2081, R. S.; but that the trustee took *no beneficial interest* thereby in the trust estate.
2. A decree in equity does not ordinarily affect the rights and interests of persons not made parties, but binds those of the actual parties, so far as the court has jurisdiction; and its jurisdiction to bind such parties does not depend upon the presence before it of all persons who are proper parties to the suit.
3. Thus, in a suit against A. and B., the grantor of the trust and the *cestui que trust* named in said trust deed, to have a mortgage by A. to X. in trust for B. (made after said deed of trust) adjudged fraudulent as against the plaintiffs in that suit, who were judgment creditors of A., and to subject the mortgaged lands to said plaintiffs' judgment against A. (the alleged fraud being that of A. and B., and not of X.), the non-joinder of X. as defendant did not disable the court to take jurisdiction; and its decree that the mortgage was in fraud of A.'s creditors, binds A. and B. and all persons claiming under them subsequently to that suit.
4. A clause in such decree, reserving the rights of the trustee, *held* to protect

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- only those rights in the property (if any) which he did not hold for the benefit of B.
5. Where, pending such creditor's suit, the trustee brought, in another court, an action to foreclose said mortgage, and made said creditors defendants therein as persons claiming some interest in the premises, which interest was alleged to be subsequent and subject to the mortgage: *Held*, that he could not *compel* them to litigate in that action the question of the validity of such mortgage as against their judgment.
 - [6. Whether the question of the fraudulent character of a mortgage as against the mortgagor's creditors can *properly* be litigated in a foreclosure suit, and whether, where the creditors are made defendants only under the general allegations above described, a judgment against them will bar them from asserting, *in a suit subsequently commenced*, that their rights are paramount to those of the mortgagee, somewhat considered, but not determined here.]
 7. On the non-appearance of such creditors in the foreclosure suit, judgment of foreclosure went against them with other defendants; and the land was bid off by the trustee, X., at the foreclosure sale. A decree being afterwards rendered in favor of the plaintiffs in said creditor's suit, the same lands were sold to F. on their judgment against A. *Held*, that F. acquired by such sale the whole interest of A. and B., and, if X. took the legal title by purchase at the foreclosure sale, he holds it in trust for F.
 8. If X., by the trust deed to him, had taken power to dispose of the property at his own discretion, one who, pending said creditor's suit, and after the foreclosure sale, took from him a deed of the lands in question, must at least have shown, as against F., that he took his conveyance in good faith, for value, without knowledge of the rights of A.'s creditors.
 9. In this case, however, X. having taken, by the terms of the trust deed, no power of disposition except at the direction of the *cestui que trust*, one purchasing from him pending the creditor's suit against A. and B. was bound to take notice of that suit, and could not acquire title under a foreclosure of the mortgage therein adjudged void.
 10. Under the general law, if any person other than the grantee in a tax deed of land, or one claiming under him, actually occupies the land during the three years next after the recording of the tax deed, such grantee loses all title under the deed; and under the charter of the city of Janesville, such a grantee loses title, under like circumstances, after the expiration of *one* year from the recording of the deed.
 11. If the grantee in the tax deed has peaceable possession of a *part* only of the premises during the period limited, he acquires an indefeasible title to *that part*, but not to the remainder, which is adversely possessed.
 - [12. Where a raceway (into which the waters of a river were turned by a

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dam), and a roadway connected therewith, were constructed for the sole benefit of persons owning lots abutting upon them, *it seems* that persons purchasing such lots with the right of drawing water from the raceway would take the land under the race and roadway, opposite their lots; and that such lands could not be assessed and taxed separately from such lots. But the question is not here decided.]

13. The original owners of lots on a navigable stream (whose lots on each side extended, by the law of this state, to the thread of the stream), built, under a grant of franchises from the state, a dam for hydraulic purposes across said stream, abutting at each end upon their lots, and sold and leased the right to use the water from the dam; and the grantees of such rights, their heirs and assigns, covenanted to contribute to the maintenance of the dam in proportion to the amount of water so purchased, and took the right to maintain such dam forever; but the deed conveyed no other interest in said abutting lots. Afterwards such original owners conveyed to another person the lot upon which the dam abutted at one end, by a general description according to its number, for a price very greatly disproportioned to that at which the dam and water-power were valued; and thereafter, with the knowledge and acquiescence of the grantee of such lot, continued to sell and lease rights to use the water from the dam. *Held*, upon this evidence, that there was a *severance of the ownership* of the lands upon the bank and those under the stream, and that the deed of such abutting lot was designed to convey, and did convey, only the land upon the bank.

RYAN, C. J., and ORTON, J., dissented from the judgment.

APPEAL from the Circuit Court for *Rock* County.

Action to quiet title to land. Plaintiff appealed from the judgment. The case is thus stated by Mr. Justice TAYLOR:

"This action is brought to quiet the title to certain real estate situate in the city of Janesville.

"The plaintiff claims title to the lands by virtue of a deed of conveyance from Charles D. Mead, trustee of Ann M. C. Smith, wife of A. Hyatt Smith, and mother of the plaintiff.

"The defendant claims title to the same lands by virtue of a sale made under and by virtue of a decree of the United States circuit court for the eastern district of Wisconsin.

"Both parties claim through A. Hyatt Smith as the common source of their title.

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"The plaintiff's title is derived through a mortgage executed by A. Hyatt Smith to the trustee, Mead, bearing date the 10th day of June, 1854, and purporting to be given to secure the payment of \$95,000, which, it is claimed, was due to such trustee from the said Smith. This mortgage was foreclosed in the circuit court for Rock county, and the lands sold under the judgment therein were bid off by the trustee, Mead; and afterwards the same were conveyed by said Mead, as trustee, to the plaintiff, by deed duly executed by the trustee by his attorney in fact, A. Hyatt Smith, and also personally by Ann M. C. Smith and A. Hyatt Smith. The deed on the foreclosure judgment and sale was dated September 15, 1859, and the sale was confirmed November 28, 1859. The deed from the trustee and Ann M. C. Smith and A. Hyatt Smith to the plaintiff is dated February 28, 1873.

"The deed under which the defendant claims is dated March 12, 1875, and was recorded March 30, 1875.

"The foreclosure action was commenced on the 20th of October, 1858.

"The original action in the circuit court of the United States was commenced on the 19th day of June, 1858.

"The plaintiffs in the action in the United States court were Henry C. Bowen and others, partners of the firm of Bowen, McNamee & Co. The action was a creditor's bill, based upon a judgment in favor of the plaintiffs against A. Hyatt Smith and others, rendered in the United States circuit court January 23, 1857, for an indebtedness which accrued previous to the date of the mortgage of A. Hyatt Smith to the trustee, Mead. Ann M. C. Smith and A. Hyatt Smith were defendants in the creditor's suit, but Mead, the trustee, was not a party thereto. The plaintiffs in the creditor's bill were made defendants in the foreclosure suit, but did not appear or answer, nor were they personally served with process in such action. Ann M. C. Smith was neither plaintiff nor defendant in said foreclosure suit.

"The object of the creditor's bill was to subject the real estate mortgaged by A. Hyatt Smith to the trustee, Mead, to the payment of the judgment of the plaintiffs in said action, and to have such mortgage declared fraudulent and void as to the creditors of said A. Hyatt Smith. The final judgment rendered in such action declared such mortgage void as to such creditors, and directed the same to be sold to pay the plaintiffs' debt and the costs of the action, and it was sold accordingly.

"In the foreclosure case, the complaint as to the plaintiff, in the creditor's suit alleged, in the usual form, 'that they had, or claimed to have, some interest in or lien upon the said mortgaged premises, or some part thereof, by mortgage, judgment or otherwise, but which lien, if any, was subsequent and subject to the lien of said mortgage;' and the ordinary judgment of foreclosure, and for the sale of the mortgaged premises, was entered.

"The rights of the contestants in this action, so far as it is necessary to investigate the same, depend wholly upon the force and effect of these judgments."

The cause was first argued at the January term, 1878; and by order of the court certain questions were reargued at the August term, 1878.

For the appellant, there were separate briefs by *Bennett & Sale* and *A. Hyatt Smith*, and oral argument by *Mr. Smith*. They argued, among other things, as follows: 1. That defendant was barred by the foreclosure judgment. (1) The circuit court for Rock county in this state, by which that judgment was rendered, being a court of general jurisdiction, is presumed to have adjudicated the question of its own jurisdiction in the foreclosure suit, as to all the judgment defendants; and such adjudication is conclusive upon them all, in the absence of an appeal. *Jackson v. Astor*, 1 Pinney, 137; *Vilas v. Reynolds*, 6 Wis., 214; *Hungerford v. Cushing*, 8 id., 324; *Grignon's Lessee v. Astor*, 2 Howard, U. S., 319; *Secrist v.*

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Green, 3 Wall., 744; *Adams v. Barnes*, 17 Mass., 365; *Davenport v. Bartlett*, 9 Ala., 179; *Grier v. McLendon*, 7 Ga., 362. (2) The foreclosure judgment, having been rendered by a court of competent jurisdiction, cannot be attacked collaterally in any other court for irregularity. *Mobley v. Mobley*, 9 Ga., 247; *Wiley v. Kelsey*, id., 117; *Bridges v. Nicholson*, 20 id., 90; *Hampson v. Weare*, 4 Iowa, 13; *Kerr v. Leighton*, 2 G. Greene, 196; *Wright v. Marsh*, id., 94; *Barney v. Chittenden*, id., 165; *Patterson v. The State*, id., 492; *McIlvoy v. Speed*, 4 Bibb, 85; *Estep v. Watkins*, 1 Bland, 486; *Ranoul v. Griffie*, 3 Md., 54; *Davis v. Helbig*, 27 id., 452; *Cochran v. Davis*, 20 Ga., 581; *Greenlaw v. Kernahan*, 4 Sneed, 371; *White v. Albertson*, 3 Devereaux' Law, 241; *Williams v. Woodhouse*, id., 257; *Lyles v. Brown*, Harper, 31; *Sutherland v. DeLeon*, 1 Texas, 250; *Perryman v. The State*, 8 Mo., 208; *Billings v. Russell*, 23 Pa. St., 189; *Moore v. Robison*, 6 Ohio St., 302; *Cochran v. Loring*, 17 Ohio, 409; *Newman v. Cincinnati*, 18 id., 323; *Obert v. Hammel*, 18 N. J. Law (3 Har.), 73; *Simpson v. Hart*, 1 Johns. Ch., 91; *Murray v. Murray*, 5 id., 60; *Wesson v. Chamberlain*, 3 N. Y., 331; *Lamprey v. Nudd*, 9 Foster, 299; *White v. Landaff*, 35 N. H., 128; *Banister v. Higginson*, 15 Me., 73; *Woodman v. Smith*, 37 id., 21. (3) If Mead had been made a party to the creditor's suit, a question of conflict of jurisdiction between the two courts over the subject matter of the two suits might have been raised and determined on plea of suit pending, made by Bowen & Co., in the foreclosure suit. But as Mead was not a party to the creditor's bill, his foreclosure could not be interfered with, nor his judgment and sale prevented, except by an issue on the merits. *Elliott v. Peirsoll*, 1 Pet., 340. (4) The conclusive character of the judgment of foreclosure relates to every point which was either expressly or by necessary implication in issue, and which was decided or must necessarily be decided in order to support the decree. *Bank of U. S. v. Beverly*, 1 How., U. S., 134; *Parrish v. Ferris*, 2

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Black, 606; *Town v. Lamphere*, 34 Vt., 365; *Church v. Chapin*, 35 id., 223; *Shears v. Dusenbury*, 13 Gray, 292; *Wright v. Butler*, 6 Wend., 284; *Embury v. Conner*, 3 Coms., 522; *Doty v. Brown*, 4 id., 72; *Castle v. Noyes*, 14 N. Y., 329; *Campbell v. Ayres*, 1 Clarke (Iowa), 258; *Board of Supervisors v. Railroad Co.*, 24 Wis., 123-5; *Van Pelt v. Kimball*, 18 id., 362; 1 Greenl. Ev., 534; 2 Smith's L. C., 594, 791, 795, 797, 809, 810. (5) The question of priority of incumbrances may be, and to prevent multiplicity of suits of necessity must be, raised and determined in a foreclosure suit; and this involves the necessity of determining the validity of conflicting incumbrances in such suits. *Clason v. Shepherd*, 6 Wis., 374; 10 id., 356; *Hathaway v. Baldwin*, 17 id., 616; *Pelton v. Farmin*, 18 id., 222; *Palmer v. Yager*, 20 id., 91; *Board of Supervisors v. Railroad Co.*, *supra*; *Corning v. Smith*, 2 Seld., 84; *Freeman v. Schröder*, 43 Barb., 618; *Frost v. Koon*, 30 N. Y., 428; *Lewis v. Smith*, 9 id., 502. Upon the question of priority the decree will be held valid, where collaterally called in question, whether the complaint contains a prayer to that effect or not. *Board of Supervisors v. Railroad Co.*, *supra*. (6) After a sale upon foreclosure, the validity of the mortgage cannot again be called in question. *Gest v. Flock*, 2 N. J. Eq., 108; *Lunsing v. Gælet*, 9 Cow., 346. The purchaser at such sale takes the complete title of the mortgagor and mortgagee; and the parties to the foreclosure suit and their privies are estopped from disputing such title. *White v. Evans*, 47 Barb., 179; *Holden v. Sackett*, 12 Abbott Pr., 473; *McGee v. Smith*, 16 N. J. Eq., 462; *Carter v. Walker*, 2 Ohio St., 339; *Finney v. Boyd*, 26 Wis., 366; Tay. Stats., 1701, § 4; Laws of 1869, ch. 40. (7) A purchase under a decree foreclosing a mortgage is not affected by the pendency of a suit to which the mortgagee was not a party. *Fenwick v. Macey*, 2 B. Mon., 469; *Hoyt v. Jones*, 31 Wis., 389. (8) The foreclosure suit was a proceeding *in rem*, and, having been conducted according to the law of this state, is

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conclusive as to the condition of the property in suit, and the rights and equities of all persons claiming title thereto under A. Hyatt Smith. Story's Conflict of Laws, §§ 549-52, 591-3; *Thomas v. Lawson*, 21 How., U. S., 331; *Phelps v. Holker*, 1 Dallas, 261; *Bissell v. Briggs*, 9 Mass., 467-9; *Nash v. Church*, 10 Wis., 303. 2. That plaintiff was not bound by the judgment in the creditor's suit. (1) The rights of Mead, under whom plaintiff claims, were expressly reserved by the decree in that suit. (2) Mead not having been a party to that suit, his rights could not have been affected by any form of decree therein. [To this general proposition numerous cases were cited.] (3) A trustee is a necessary party to a suit in regard to the trust property, and the court can take no jurisdiction of the legal title without making him a party. *Phipps v. Tarpley*, 24 Miss., 597; *Marble v. Whaley*, 33 id., 157; *Cassiday v. McDaniel*, 8 B. Mon., 519; *Helm v. Hardin*, 2 id., 231; *Ashton v. Atlantic Bank*, 3 Allen, 217. The *cestui que trusts* are not necessary parties to a suit in equity in which a mortgage for their benefit is brought in question. The trustees, as owners of the legal estate, are the proper parties. R. S. 1858, ch. 84, sec. 16; *New Jersey, etc., Co. v. Ames*, 12 N. J. Eq., 507; *Sill v. Ketchum*, Harr. (Mich.), 423. In *Mead v. Walker*, 15 Wis., 449, this court decided that in a case relating to this trust, Mead is a necessary party. In the absence of the legal owner of the land, the federal court in the creditor's suit had no jurisdiction of the subject matter. *Hoyt v. Jones*, 31 Wis., 389; *Van Epps v. Van Epps*, 9 Paige, 238; Story's Eq. Pl., § 427.

For the respondent, there were separate briefs by *Cassoday & Carpenter*, his attorneys, and *A. A. Jackson*, of counsel; and also a joint brief and oral argument by Messrs. *Cassoday* and *Jackson*. They contended, among other things, 1. That the decree of the federal court on the creditor's bill was valid and effectual, although the trustee was not a party thereto. (1) The proceedings in that suit were regular under the act of

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congress of February 28, 1839 (R. S. of U. S., sec. 737), and Equity Rules 47-50 of the federal court; and these merely rendered definite and certain what was before discretionary in a court of equity. *Bank v. Stafford*, 12 How., U. S., 327, 341-3; *Elmendorf v. Taylor*, 10 Wheat., 152, 161-8. The saving clause in the decree was inserted merely in conformity with the statute and rules above cited and the practice of the federal courts. (2) The rules and statute do not authorize the court to divest a person of an actual beneficial title in himself, without making him, or those privy in interest with him, parties; but under them the court may divest the actual parties of all equitable or legal title or interest in the subject matter of the suit, if that be within the jurisdiction of the court. (3) Courts of equity generally require the presence of all persons interested in the property involved in the litigation; but sometimes they proceed for and against *cestui que trusts* without the trustee who has no beneficial interest in the subject matter, even where there is no difficulty in obtaining jurisdiction. *Cestui que trusts*, however, being the persons whose beneficial interest is affected, must always be before the court, except in very rare instances, where a peculiar trust is created or some particular statute gives authority to proceed without them by reason of privity of interests. In support of this view, counsel cited and commented at length upon the following authorities: 1 Daniell's Ch. Pr., 197-9, 213-14; *Edmeston v. Lyde*, 1 Paige, 637; *McNab v. Young*, 81 Ill., 11; *James v. Railroad Co.*, 6 Wall., 752; *Payne v. Hook*, 7 id., 425; *Batesville Institute v. Kauffman*, 18 id., 151-4; *Bank v. Seton*, 1 Peters, 299; *Story v. Livingston*, 13 id., 359; *Mal-low v. Hinde*, 12 Wheat., 193; *Boon's Heirs v. Chiles*, 8 Peters, 532; 10 id., 177; *Harrison v. Urann*, 1 Story C. C., 64; *West v. Randall*, 2 Mason, 181, 192-3, 195-6; *Joy v. Wirtz*, 1 Wash. C. C., 517; *Wendell v. Van Renssalaer*, 1 Johns. Ch., 350; *Watson v. Le Row*, 6 Barb., 481; *Comm'rs, etc., v. Gellatly*, L. R., 3 Ch. Div., 610 (18 Moak, 717); *Mare*

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v. Malachy, 1 Myl. & Craig, 559; *Walworth, etc., v. Holt*, 4 id., 619; *Richardson v. Hastings*, 7 Beav., 301, 323; *Holland v. Baker*, 3 Hare, 68; *Kirk v. Clark*, Finch's Prec., 275; *Head v. Ld. Teynham*, 1 Cox, 57; *Cockburn v. Thompson*, 16 Ves., 326, 329; *Supervisors v. M. Pt. Railroad Co.*, 24 Wis., 93, 131-4; *West v. Sanders*, 1 Marsh., 110. 2. That defendant's rights were not affected by the foreclosure judgment and sale. (1) Even if the foreclosure suit had been commenced *before* the creditor's suit, the decree in the former would not have barred the plaintiffs in the latter of the rights asserted therein. The object and effect of a foreclosure suit is merely to destroy the *equity of redemption*, and to vest in the purchaser at the sale the title which the mortgagor had at the time of the execution of the mortgage. 2 Washb. R. P., 219 et seq., 507; HARRIS, J., in *Holcomb v. Holcomb*, 2 Barb., 23; PARKER, C. J., in *Penniman v. Hollis*, 13 Mass., 431. The only allegation against Bowen, McNamee & Co. in the suit here in question was, that they had or claimed some interest in or lien upon the premises, which lien, if any, was *subsequent and subject* to the lien of the mortgage there in suit. If they had filed an answer setting up what was contained in their creditor's bill, such answer would have been in no way responsive to the complaint, but a substantive cause of action by them against Mead as trustee, based on facts *dehors* the complaint, note and mortgage. They were not obliged to set up such a cause of action, nor would Mead have been obliged to submit to such a proposed controversy, touching an alleged right *paramount* to the mortgage. If a defendant in a foreclosure suit claims no right or equity of *redemption*, subsequent to the mortgage, he should either disclaim or decline to answer. *Strobe v. Downer*, 13 Wis., 11, 14-16; *Pelton v. Farmin*, 18 id., 222, 239; *Roberts v. Wood*, 38 id., 60, 68; *Holcomb v. Holcomb*, 2 Barb., 20; *Corning v. Smith*, 6 N. Y., 82, 84; *Lewis v. Smith*, 9 id., 502, 514. Moreover, Mrs. Smith was not a party to the foreclosure, but was an essential party to the

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creditor's suit; and for this reason also the issues involved in the latter could not be tried in the foreclosure suit. Again, the foreclosure by Mead, and the sale to him, as trustee, changed the nature of the trust property from personal to real, but did not sever the trust relation or give any beneficial interest; and plaintiff stands in no better position than Mead did after the sale, there being no evidence that he paid any consideration, and he being presumed, as the son of Mr. and Mrs. Smith, to know the condition of the property and title.

(2) The foreclosure suit having been commenced after the time when the federal court acquired jurisdiction of the subject of litigation and the parties in the creditor's suit, such parties could lose nothing by not appearing in the foreclosure suit.

Wallace v. McConnell, 13 Pet., 146; *Campbell v. Emerson*, 2 McLean, 30, 32-3; *Greenwood v. Rector*, Hempst., 708; *Smith v. M'Iver*, 9 Wheat., 532, 535-6; *Gaylord v. Railroad Co.*, 6 Biss., 286, 290-293; *Union Trust Co. v. Railroad Co.*, id., 197; *Wood v. Lake*, 13 Wis., 84. 3. That plaintiff had no such title as could be clouded by the decree of the federal court and the sale made thereon. "Where one party has acquired the legal right to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title." *Mead v. Norton*, 11 Wall., 442, 458; *Stark v. Starrs*, 6 id., 419; *Johnson v. Towsley*, 13 id., 72, 85; *Gibson v. Chouteau*, id., 92, 102; *Carpentier v. Montgomery*, id., 480, 497; *Edmeston v. Lyde*, 1 Paige, 640-41; *Van Epps v. Van Epps*, 9 id., 237; *Hill on Trustees*, 222. In a court of equity, against a plaintiff claiming that defendant's title is a cloud, an equitable defense is just as good as a legal defense. *Torrent v. Muskegon Booming Co.*, 22 Mich., 21.

The following opinion was filed September 2, 1879.

TAYLOR, J. On the part of the plaintiff's counsel it is contended, that as the trustee, Mead, was not made a party to the

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creditor's suit, his right as mortgagee was in no way affected by the judgment declaring said mortgage fraudulent and void; and that, by virtue of the foreclosure suit and sale therein, the legal title became vested in him, subject to the trusts declared in the deed of trust between A. Hyatt Smith and wife and said trustee. It is claimed —

1. That the judgment in the creditor's suit is void, not only as to Charles D. Mead, but as to Ann M. C. Smith and A. Hyatt Smith, the *cestui que trust* and the grantor of the trust estate, because the trustee was not a party to that action.

2. That if the judgment is not void as to the *cestui que trust* and the grantor of the trust estate, it can have no further effect than to transfer to the purchaser under the sale in that action the rights of the *cestui que trust*, Ann M. C. Smith, and any rights which A. Hyatt Smith had in the equity of redemption.

3. That although the plaintiff purchased the real estate in question *pendente lite*, he is not chargeable with notice of the rights of the plaintiffs in the creditor's action, for the reason that his grantor, the trustee, was not a party thereto, and did not claim to hold by purchase from any party thereto subsequent to the commencement thereof.

4. That in consequence thereof, admitting that the defendant has acquired the rights of the *cestui que trust*, Ann M. C. Smith, such right can only attach to the property in the hands of the trustee at the date of the entry of the judgment, or at the time of actual notice thereof given to such trustee.

5. That the sale to the plaintiff having been made long before the entry of the judgment in the creditor's suit, his title thereby became perfect, and was entirely unaffected by the entry of judgment and sale thereafter made; and

6. That the judgment in the foreclosure action was an absolute bar against the plaintiffs in the creditor's suit alleging that the mortgage given by Smith to Mead was fraudulent and void as to them; and by it they are estopped from claiming

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any benefit of the judgment in the circuit court of the United States.

On the part of the counsel for the defendant it is claimed:

1. That as the trustee had no beneficial interest in the trust estate, the circuit court of the United States had the power, in an action against the grantor of the trust estate and the *cestui que trust*, to declare such trust fraudulent and void, not only against the grantor of the trust estate and the *cestui que trust*, but also against the trustee.

2. That if the judgment in the circuit court did not and could not divest the trustee of any title or interest he had in the trust estate, yet it had the power to divest all the beneficial interest the *cestui que trust* and the grantor of the trust had therein, and that the purchaser under the judgment in that action acquired all the right, estate and interest both of Ann M. C. Smith and A. Hyatt Smith in and to the real estate in controversy, and the trustee must, after such sale under that judgment, hold the same for the benefit of such purchaser.

3. That the plaintiff, having purchased *pendente lite*, took the estate subject to the rights of defendant.

4. That the plaintiffs in the action in the circuit court are not bound by the judgment in the foreclosure action instituted by the trustee, and the judgment and sale therein: *first*, because, although made defendants therein, they were not bound to litigate the question in that action whether the mortgage was fraudulent and void as to them; that such litigation is a litigation of a question of title adverse and paramount to the title claimed under the mortgage, and is not properly triable therein; and *second*, because, having already commenced an action in the circuit court of the United States against the real parties in interest, for the express purpose of litigating the question as to the fraudulent character of the mortgage sought to be foreclosed in the action in the circuit court for Rock county, they had the right to have that question

litigated in the court where they had first commenced their action, and that neither the *cestui que trust*, Ann M. C. Smith, nor A. Hyatt Smith, the maker of the trust, nor the trustee representing them, could, by commencing an action in some other court, compel them to litigate that question in such other court.

In order to fully comprehend the effect which must be given to the two judgments above mentioned, it will be necessary to state briefly the nature of the trust deed under which it is claimed the lands were held by Mead, the trustee therein named, as well as the alleged nature of the alleged indebtedness to secure the payment of which A. Hyatt Smith gave the mortgage to such trustee.

The trust deed under which it is claimed that Mead held the mortgage, and acquired the legal title to the lands therein described by the foreclosure thereof, was apparently executed the 26th day of January, 1841, by A. Hyatt Smith, as party of the first part, Ann M. C. Smith, party of the second part, and Charles D. Mead, party of the third part. It recites at length an ante-nuptial contract between A. Hyatt Smith and Ann Margaret C. Kelly, which states that the parties were about to contract marriage; that Ann M. C. Kelly was the owner of considerable personal and real estate, and that A. Hyatt Smith contracts and agrees with her that notwithstanding their marriage she shall have the entire control of her separate property, not subject to the debts of said Smith, nor in any way subject to his control, and that he will, after their marriage, execute and deliver all instruments in writing necessary to carry into full effect the true intent and spirit of such agreement. This ante-nuptial contract bears date April 3, 1838. After reciting this contract, in pursuance thereof Smith and wife sell, assign, transfer and set over to the party of the third part, Charles D. Mead, all the personal property, choses in action, etc., which the said party of the second part, Ann M. C. Smith, had at the time of her marriage, or was

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entitled to, or had since or should thereafter become entitled to by reason of such personal property or estate, in trust to invest the same in his discretion, and to receive the interest and income thereof during the joint lives of the said parties of the first and second parts, and to pay the same to the said party of the second part and her assigns, notwithstanding her coverture, for her sole and separate use, during the joint lives of the parties of the first and second parts, with power to the said party of the second part, by an instrument in writing under her hand and seal, to appoint and direct the said party of the third part to dispose of, sell, assign and transfer the said personal property, etc., or any part thereof, according to such appointment of the said party of the second part; and if said party of the second part should survive the said party of the first part, and in default of any appointment by the said party of the second part, then, upon trust to pay and transfer to the said party of the second part all of said personal property, etc.; but in case the said party of the second part shall die in the life-time of the said party of the first part, then, in trust, after the decease of the said party of the second part, to assign and transfer the said personal property, etc., to such person or persons, and in such shares, as the said party of the second part shall, notwithstanding her coverture, by her last will and testament limit or appoint, and in default thereof and of any appointment as aforesaid, then to the next of kin of the said party of the second part.

The deed then goes on to grant to said Mead, as trustee, all the real estate which Ann M. C. Smith had at the time of her marriage, and at the time of the making of such deed, in trust to hold the same and pay the rents, issues and profits thereof to the party of the second part during the joint lives of the parties of the first and second parts, or to such person or persons as she may in writing appoint, for her sole and separate use, and upon the further trust to convey the said real estate, and any and every part thereof, to such person or

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persons and for such estates as the said party of the second part shall at any time appoint by deed or any instrument in writing sufficient to pass real estate, and upon the death of the party of the first part, if the party of the second part shall survive, and in default of such appointment, then to convey the same to the party of the second part and her heirs; but in case the said party of the second part should die in the lifetime of the party of the first part, then to convey the said real estate, and any and every part thereof, to such person or persons and for such estates as the said party of the second part, by her last will and testament in writing, or by any instrument in writing in the nature of or purporting to be her last will and testament, shall direct and appoint; and in default of any appointment, then to the heirs-at-law of the said party of the second part, in fee simple forever. The third party, Mead, covenants with the party of the first part to perform those things that are of him required in the just discharge of the trusts therein declared, and accepts and undertakes the execution thereof.

The mortgage from A. Hyatt Smith to Mead is simply a mortgage to Mead as trustee of the separate estate of Ann M. C. Smith, and does not state upon what, if any, trust the mortgage is to be held; but it is alleged that the indebtedness which the mortgage secured was an indebtedness from Smith to Mead as trustee of the separate estate of Ann M. C. Smith.

We come now to the consideration of the effect which must be given to the two judgments under which the parties claim the real estate. We will first consider what title, if any, passed to the defendant by virtue of his purchase at the sale made in pursuance of the judgment of the circuit court of the United States. The plaintiff claims that no title of any kind, either legal or equitable, passed by such sale. The only reason alleged is, that Charles D. Mead, in whom it is claimed the legal title to the real estate sold was vested at the time of such sale, was not a party to such action, and therefore no

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questions as to such legal title, or any other title, could be adjudicated in that action. It is broadly claimed that, as such fact was made to appear in said action, it was a usurpation on the part of such court to proceed with the action and make any final adjudication therein, affecting the title to such real estate, without making such trustee a party thereto. We cannot hold that the absence of the trustee as a party to such action can have the effect to deprive that court of all power to pass upon the rights of the parties properly before it in and to the real estate, because the legal title was held by Mead, who was not a party. If the rights of the parties before the circuit court of the United States, in and to such real estate, were of such a nature that that court would have had the power to divest them thereof, and direct them to be sold and transferred for the purpose of satisfying the claims of the plaintiffs in such action, had the trustee holding the real estate been a party defendant with them, then it would seem that there could be no want of power to do the same thing in the absence of such trustee, although there might be a want of legal propriety in doing so; especially in a case like the present, where the ground upon which the court proceeded to divest the parties before it of the right claimed by them in the real estate was, that, as to the plaintiffs, the transfer of the legal title to the trustee was fraudulent and void.

The fact that the legal title to real estate is vested in a trustee, is certainly no reason why the creditors of the *cestui que trust* should not be permitted to proceed, in the absence of the trustee, to subject the interest of such *cestui que trust* to the payment of their debts, if they do not attack the validity of the trust itself, especially when the trustee has in fact no beneficial interest in the trust estate; and there does not appear to be any very serious objection to proceeding without the trustee, when the alleged interest of the grantor of the trust property and of the *cestui que trust* are sought to be subjected to the payment of the debts of the grantor of the

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trust property on the ground of the fraudulent nature of the grant to the trustee, the fraud alleged being the fraud of the grantor and the *cestui que trust*, and not of the trustee.

There are but two apparent reasons why, in such case, the trustee holding the legal title should be a party to the proceeding: *first*, that, as the parties plaintiff insist that such legal title is held for their benefit, he ought to be present so that the court could make an end of litigation by compelling the trustee to convey to the plaintiff, or divest his legal title by a judicial sale under the judgment; and *second*, that he ought to be made a party so as to enable him to protect the rights of his *cestui que trust*. The second reason can have but little weight when the *cestui que trust* is of full age, and is a party.

In the decision of this case we do not deem it necessary to determine whether the legal estate ever passed, in fact, to the trustee, and shall, for the purposes of the decision, admit that the legal estate passed to the trustee by virtue of the sale under the foreclosure judgment, and that, as between himself and A. M. C. Smith, he held the same subject to the trust declared in the deed of trust above referred to. By an examination of the provisions of such trust deed, it will be seen that the trustee had really no beneficial interest in the trust estate, but held the same absolutely subject to the will of the *cestui que trust*. The whole beneficial estate was in her, and at her death, unless disposed of during her life-time by appointment or will, as provided for in the deed, it went absolutely to her heirs. We do not, however, hold that it was a mere naked trust, so that, under the provisions of section 2075, R. S. 1878, the legal estate vested in the *cestui que trust*. We think the case of *Goodrich v. Milwaukee*, 24 Wis., 42, very clearly shows that the trust in this case was an active trust, and valid under subdivision 5 of section 2081, R. S. 1878.

After giving the case as full consideration as is consistent with our other duties, we have concluded:

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1. That the circuit court of the United States had jurisdiction to proceed with the action, in the absence of the trustee, Mead, as a party.

2. That it had jurisdiction over A. Hyatt Smith, the grantor of the trust estate, and Ann M. C. Smith, the person for whose sole benefit the trust was created.

3. That the court had the power to determine the question whether the trust estate was conveyed in fraud of the creditors of the grantor, Smith.

4. That, the court having adjudged that the trust was void as to the creditors of Smith, and that the real estate was subject to the payment of the demands of such creditors, it had the power to direct the sale of the same for the payment of such debts; and that, by virtue of the sale under the decree of said court, the purchaser took all the rights, interest and estate which A. Hyatt Smith and Ann M. C. Smith had in said real estate at the time of the execution of the mortgage by Smith to the trustee, Mead, and they are barred of all claim to such estate or any interest therein.

5. That, the foreclosure action having been commenced after the action was commenced in the circuit court of the United States, the judgment and proceedings therein did not bar the plaintiffs in that action from alleging the fraudulent nature of the mortgage to the trustee.

6. That, as the trustee was not a party to the action in the circuit court of the United States, he had the right to foreclose the mortgage; and that, by virtue of such foreclosure and sale, the legal title became vested in him.

7. That there is no evidence in the case showing that the plaintiff is a *bona fide* purchaser of the legal estate from the trustee, without notice of the rights of the defendant, so as to relieve the estate in his hands from the equitable rights of the defendant therein.

The absence of proper parties to an equitable action is not a jurisdictional defect which renders the proceedings and judg-

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ment in the action void as between the persons who are parties to the same, so that they can impeach the judgment in a collateral proceeding. The judgment in such case does not ordinarily affect the rights of the persons not made parties, and they are not bound by the judgment; but as to those persons who were parties, their rights and interests are bound by the judgment, so far as the court has jurisdiction to pass upon the same; and the jurisdiction of a court of equity to pass upon and bind the rights and interest of a party before it does not depend upon the question whether all the proper parties are before it, but upon the nature of the rights of the parties before it, and upon which the court passes judgment.

This, we think, is fully established by the authorities cited by the very able counsel for the respondent, whose industry in the collection of the precedents on this point renders it unnecessary for the court to do more than refer to the authorities collected.

In the case of *The Supervisors v. Mineral Point Railroad Co.*, 24 Wis., 93, 131, this court fully recognized the right of the court to proceed with a litigation and adjudicate upon the rights of the parties before the court to either real or personal property, in the absence of a party or parties holding the legal title to such property in trust for the parties so litigating, and the propriety of its doing so. Chief Justice Dixon, in delivering the opinion in that case, says:

“But, because a party not served with process, and not before the court, may collaterally dispute the decree and deny its validity, it does not, we think, follow that other parties who were served, and over whose persons the court in fact acquired jurisdiction, may do the same thing; nor do we know of a decided case where such a doctrine has been held.

“The *force* or efficacy of a decree, as between *the parties before the court*, does not depend upon the fact that there may be other persons, proper or necessary parties, who are not

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before it. The absence of such persons is not a defect *involving the jurisdiction* or power of the court over the parties who are present, or over the subject matter of the suit so far as those parties may be concerned. The court may, nevertheless, proceed to a decree, and such decree, though rendered in violation of the rules and practice of equity in such cases, is not void as between the parties to it. It is irregular, but not void. It *binds the parties* to it until set aside or reversed in some direct proceeding for that purpose. And the reason of this is obvious. Jurisdiction *exists* wherever there is a *suit*, the *subject matter* of which is *cognizable* in a court of chancery, and parties are before the court *whose rights* in relation to such subject matter the court may adjudicate; and the *effect* of such adjudication between the parties, until reversed or set aside, does not depend upon the fact that the power of the court may have been erroneously exercised in making it. If there be necessary parties wanting, whose absence may render the adjudication fruitless or ineffectual, because the rights of such parties cannot be determined, that may be good cause for arresting the proceedings or dismissing the suit, but it does not deprive the court of power to proceed. . . . Each case must still be determined, to a considerable extent, upon its own peculiar facts and circumstances; the object of all rules upon the subject being in accordance with the cherished principle in equity, that the adjudication may be as complete and conclusive as possible. If, in a doubtful case, the court should err in this respect, it would be a most extraordinary conclusion that it had lost all jurisdiction, and its decree was of no effect. And, if it would not be so in a doubtful case, then it can make no difference with the application of the principle that the question presented was a plain one and easy to be decided. *The jurisdiction of the court cannot be determined by the magnitude of the error.* Again, there is a class of cases in which the bringing in of *additional parties* may be said to rest, in a great measure, in the *sound discre-*

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tion of the court. Should the court abuse its discretion and commit great error in such case, would that oust the jurisdiction? We say, clearly not. . . . The rule to be gathered from all the authorities may, in few words, be stated to be, that in no case does the jurisdiction of the court over the subject matter and parties properly before it depend, nor can it be made to depend, on the absence of other parties, however the right of such other parties may be complicated by the decree, or however necessary it may be that they should be brought in, in order that a complete and final determination of the controversy may be had."

In the case of *Day v. Wetherby*, 29 Wis., 363-370, this court approves of the opinion in the 24 Wis., above cited, and expressly declares that where the trustee holds the legal title in trust solely for the benefit of third persons, who have the sole equitable interest, in an action to have such property so held in trust applied to a different purpose than that expressed in the trust, such third persons are the real parties in interest, and necessary parties to the action.

The case of *Boon's Heirs v. Chiles*, 8 Peters, 532, and 10 Peters, 177, was a case very much in point, and shows conclusively that a court of equity will adjudicate upon the equitable interests of parties claiming title to real estate, in the absence of the person holding the legal title. In that case, one William Hay, in whom the legal title to the real estate was vested, made, in substance, a contract to sell the same to one George Boon. George Boon sold his interest in the contract of purchase to one Thomas Boon. Thomas Boon made a conditional sale to one Hezekiah Boon, which it was conceded by the parties was void. Chiles claimed as purchaser from Hezekiah Boon, and claimed to be a purchaser in good faith. The action was commenced by Thomas Boon against Chiles, and after Thomas Boon's death the action was continued in the name of his heirs. The object of the action was to compel Chiles to release to the plaintiffs all the pre-

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tended title he had to the lands in question, by reason of his pretended purchase from Hezekiah Boon. Other relief was asked, which it is not material to state here. Chiles objected to the jurisdiction of the court, on the ground that the heirs of Hay, who had died, were not all parties to the bill, and that some of them resided out of the jurisdiction of the circuit court for the district of Kentucky, where the action was commenced, and that they could not, therefore, be made parties to such action; and it was urged that the court could not proceed with the case in the absence of such parties. It was held by the supreme court of the United States, that, as both parties claimed under the vendee of Hay, their rights as between themselves could be settled and adjudicated by the court without the presence of Hay or his heirs. In this case the late learned Chief Justice MARSHALL, who delivered the opinion, says: "It is clear that the heirs of Hay can have no interest in this controversy between the heirs of Thomas Boon and William Chiles, and need not be made parties but for the purpose of obtaining a conveyance of the legal title, if it still remains in them. The court may very properly decree as between Boon's heirs and Chiles, although the heirs of Hay should not be parties. Chiles is in possession of a contract for the sale of Boon's equitable title, which Boon alleged to be totally invalid, and to have been fraudulently acquired. His heirs now allege it. Chiles maintains that the sale from Thomas to Hezekiah Boon was absolute and *bona fide*, and that the whole equitable interest of Thomas Boon is legally and justly vested in him. The heirs of Thomas Boon may certainly come into a court of equity and ask its decree to compel William Chiles to surrender this contract, if it has indeed become a nullity, or to enjoin him perpetually from the use of it, or to convey any legal title he may have acquired under color of it to those who possess the real equitable right. Should the court be unable to decree against Hay's heirs, it may decree as between Boon's heirs and William Chiles, so far as

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respects the title of Chiles under Boon, if the bill be so framed as to grant that relief."

In *Edmeston v. Lyde*, 1 Paige, 637, which was a creditor's bill to reach the equitable assets in the hands of the judgment debtor, the answer of the judgment debtor showed that he was insolvent, and that certain real estate which he had owned had been sold under execution upon other judgments, and bid in by one Buckner for his benefit, subject to the lien of such sums as he should from time to time advance for him; and that he had advanced upon the security of such real estate, for him, the sum of \$1,400. The judgment debtor held the written acknowledgment of Buckner that he held the property in trust for him as above stated. The question was, whether Buckner was a necessary party to the action, without whose presence the court could not proceed with the case. Chancellor WALWORTH, who delivered the opinion, says: "Neither was Buckner a necessary party. When the property has been fraudulently assigned by the debtor, so that he has no legal or equitable rights as against the assignee, it will be necessary to make the assignee a party to enable the court to reach the property in his hands. A decree against the fraudulent assignor would not, in that case, give any right to the property in the hands of the assignee. But when the debtor still retains the legal or equitable interest in the property, such interest may be conveyed to the complainant or transferred to a receiver, under the decree or order of this court, who can call upon the debtor or *trustees of the defendant* in the same manner as the defendant himself might have done previous to the filing of the bill. As there is no allegation of fraud as to Buckner, if he was made a defendant he would be entitled to the advances which he has made, together with his costs. If all the right of the defendants is sold under a decree in this suit, the purchaser will be entitled to an assignment of the land from Buckner, on paying the amount due. And if he should unreasonably refuse to permit the purchaser to redeem,

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he might subject himself to the costs of a suit instituted for that purpose." In this latter case the court, instead of directing the receiver to redeem the property in the hands of the trustee, Buckner, for the benefit of the complainant, directed that the equitable interest of the judgment debtor in the same be sold at public vendue, as was done in the case at bar.

In *McNab v. Young*, 81 Ill., 11, H. had given his notes to Y. for a large sum of money, and executed a trust deed to M., to secure the payment of such notes, and afterwards a part of the sum due thereon had been paid, and an action was commenced in the circuit court of the United States for the state of Illinois, praying that the deed of trust might be declared a mortgage, for the benefit of the *cestui que trust*, and Y., H. and the judgment creditors of H. were made parties, but the trustee, who was a nonresident, was not made a party. A judgment was obtained in favor of the plaintiff, and the real estate described in the trust deed was sold to pay the amount found due to the complainant. In the case of *McNab v. Young*, *supra*, the plaintiff claimed under H., and the defendants under the sale on said judgment in the circuit court of the United States. The plaintiff in the last case claimed, as the plaintiff does in this, that the proceedings in the circuit court of the United States were void because the trustee, M., was not a party to such action; but the court held otherwise. The late learned Justice BREESE, who delivered the opinion, says: "M. was not a necessary party to the proceeding, being a mere naked trustee, with no real interest in the subject of the controversy. Had the purposes of the trust been accomplished, H. would, without action on his part, have been vested with the legal title, on which he could have maintained ejectment."

The right of a court of equity to proceed against the parties before it, in the absence of another party holding a mere legal title to the property in dispute, in trust for the benefit of the parties before the court, as determined by those cases, is

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sustained by an abundance of authority. In cases of this nature it is a matter of discretion, to some extent, with the court in which the action is pending, whether the trustees shall be made a party to the action; and in cases where such party holding the naked legal title is within the jurisdiction of the court, the courts usually require him to be made a party, so that he may be compelled to convey to the party who succeeds in the action; but when such trustee resides out of the jurisdiction of the court in which the action is pending, it is customary to proceed with the action without his presence, and settle the rights of the parties before the court, leaving the successful party to proceed afterwards, if necessary, against the trustee, to compel him to convey the legal title. *Elmendorf v. Taylor*, 10 Wheaton, 152, 156, 167; *Bank v. Stafford*, 12 How., 327, 341; *Watson v. Le Row*, 6 Barb., 481. This last case presented the same questions presented in this, the only difference being that the contending parties were both creditors of the alleged fraudulent grantor. The plaintiff claimed to have his judgment satisfied out of the equitable interest which the judgment debtor had in a parcel of real estate which he had purchased and paid for, but which, by his direction, had been conveyed to trustees in trust for his wife. In that action the plaintiff had made the administrators of the judgment debtor, the heirs-at-law of his wife, and the trustees, defendants; also the defendant Harris, who claimed to own said lands by virtue of a sale and deed made in a former creditor's suit against the same judgment debtor. It appeared by the answer of Harris, that the former creditor's action was against the same judgment debtor, but that neither the trustees nor the judgment debtor's wife were made parties in said action. It was urged by the plaintiff in the second creditor's action, as it is now urged in this, that Harris acquired no interest in the real estate in question by reason of his purchase under the sale made in pursuance of the judgment in the former creditor's action, because neither the trustees nor

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the wife, who was the *cestui que trust*, were parties to such action. The court, however, held that Harris had such an interest in the real estate, by virtue of his purchase, as entitled him to defend the action; and as it was alleged by the plaintiffs in the latter action that the conveyance by the judgment debtor of the real estate to the trustees, for the benefit of his wife, was made with intent to defraud his creditors and the heirs of his wife, and the trustees had admitted such allegations of fraudulent intent by suffering the bill to be taken as confessed against them, the court ordered the action to be dismissed as to Harris, upon the ground that he showed a better title to the real estate than the plaintiff could obtain by virtue of his proceedings in that action. In the opinion in that case, Justice PAIGE, who delivered the opinion of the court, says:

“The conveyance out of the way [meaning the conveyance to the trustees], Bigelow’s [the judgment debtor’s] interest in the premises in question was an equitable interest, derived under his contract of purchase with Marcy and Clark [the persons of whom he purchased the lands]. This equitable interest was reached by the creditor’s bill of Watson and Watson against Bigelow, and was transferred to the receiver in that action by the assignment of Bigelow, and sold and conveyed by the receiver to Harris; and, Harris having thus acquired all the interest of Bigelow under the contract, he has a right to call upon Marcy and Clark to convey to him the legal title. The heirs of Mrs. Bigelow cannot now gainsay this right, having, by allowing the bill in this suit to be taken as confessed against them, admitted that Bigelow caused the conveyance to the trustees for the benefit of Mrs. Bigelow to be made with intent to defraud his creditors. By considering the conveyance in trust for Mrs. Bigelow as fraudulent and void, it may be objected that Mrs. Bigelow and the trustees ought to have been made parties to the creditor’s bill, to enable the court to reach the interest of Bigelow in the land in

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question. But I cannot see why the decree in the creditor's suit, the assignment to the receiver, and the sale to Harris, were not as effectual in passing to the latter the interest of Bigelow, under his contract of purchase, as a sale by a judgment creditor of a fraudulent grantor, under a judgment and execution at law, is to pass the title to the purchaser of the land fraudulently conveyed.

"I cannot perceive how it is necessary to make Mrs. Bigelow a party to a creditor's suit, to enable the court to reach the interest of Bigelow in the land in question. She was undoubtedly a necessary party to enable the court to reach her interest, if she had any. Why cannot Harris file his complaint against Marcy and Clark, and the heirs-at-law of Mrs. Bigelow, and compel the former to convey to him the legal title, and the latter to deliver up the possession? I see no objection to such a proceeding. The heirs-at-law may, perhaps, in the suit against them by Harris, be entitled to controvert the allegation that the conveyance in trust for Mrs. Bigelow was fraudulent, or the allegation that a trust resulted to Bigelow in favor of his creditors, unless they are estopped from doing so by suffering the bill in the present suit to be taken as confessed against them. But whatever may be the result in regard to the right and interest of Harris under the receiver's deed, to be deduced from the assumption that the conveyance in trust for Mrs. Bigelow was fraudulent and void as against creditors, I have no doubt, upon the ground that a trust resulted to Bigelow in favor of his creditors, which must be assumed from the decision in *Guthrie v. Gardner*, 19 Wend., 414, and which is alleged by the plaintiff in his bill, and cannot, therefore, be denied by him, whether that trust was a mere equitable interest in Bigelow for the benefit of his creditors, or was turned into a legal estate for the benefit of such creditors, that Harris is entitled under his deed from the receiver, either in law or equity, to the premises in question."

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This decision was concurred in by Justices WILLARD and HAND.

In *Holland v. Baker*, 3 Hare, 68, the learned vice-chancellor says: "Trustees are not themselves owners of the property; they are in a sense agents for the owners in executing the trusts, but they are not constituted agents for the purpose of defending the owners against the adverse claims of third parties in this court. It is the duty of the trustees in such a situation to object that the owners of the estate are not before the court; and I think it is the right of the trustee in that case to insist that the *onus* of resisting adverse claims shall be thrown upon the *cestui que trusts*, and not on themselves.

. . . I have said that it is the duty of the trustees to require that all their *cestui que trusts* should be before the court. If the court is to dispense with the presence of any number of them in order to avoid the inconvenience of bringing so large a body of creditors before the court, it seems of necessity to follow that the trustees of the property upon which the court is to act should be parties to that record, that they at least might be able to inform the court whether it is sufficiently framed with reference to the interest of the whole of the *cestui que trusts*, by the selection of those who, in the existing state of things, are in a position adequately to represent the interest of the body."

There are some things said in the above case which may seem to be in conflict with the decision in the case of *Kerrison v. Stewart*, 93 U. S., 155, in which it is held that where trustees have, by virtue of the powers conferred upon them, the right to act on behalf of the *cestui que trusts*, and to bind them by their acts, whether done with or without their assent, such *cestui que trusts* are not necessary parties to an action affecting the trust property, and are bound by a judgment rendered in an action against the trustees alone; but when the facts of the two cases are considered, they do not necessarily conflict.

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The doctrine of the cases above cited, and from which parts of the opinions have been quoted, is sustained by the cases cited below. *Bank v. Stafford*, 12 How. (U. S.), 327, 341; *Elmendorf v. Taylor*, 10 Wheat., 152-154; *Moody v. Gay*, 15 Gray, 457; *Bank v. Seton*, 1 Peters, 299; *Story v. Livingston*, 13 Peters, 359; *Mallow v. Hinde*, 12 Wheat., 193; *Harrison's Adm'r v. Urann*, 1 Story C. C. R., 64; *West v. Randall*, 2 Mason, 181, 193; *Joy v. Wirtz*, 1 Wash. C. C. R., 517; *Wendell v. Van Rensselaer*, 1 Johns. Ch., 350; *Wood v. Davis*, 18 How. (U. S.), 468; *Shields v. Barrow*, 17 How. (U. S.), 139, 141; *Barney v. Baltimore City*, 6 Wall., 280-290; *Jones v. Andrews*, 10 Wall., 327; *Batesville Institute v. Kauffman*, 18 Wall., 151; *Inbusch v. Farwell*, 1 Black, 566, 571; *Hagan v. Walker*, 14 How. (U. S.), 29, 37; *Clearwater v. Meredith*, 21 How. (U. S.), 489; *Ober v. Gallagher*, 93 U. S., 204; *Mare v. Malachy*, 1 Mylne & Craig, 559; *Richardson v. Hastings*, 7 Beavan, 301; *Cockburn v. Thompson*, 16 Ves. Jr., 326; *Slade v. Rigg*, 3 Hare, 35; *West v. Sanders*, 1 Marshall (Ky.), 110; *Beck v. Burdett*, 1 Paige, 308, 309; Story's Eq. Pl., § 193.

This rule is recognized and adopted as a rule of court in equity cases in the courts of the United States (see Equity Rules 47 and 48, U. S. Cir. Ct.), and is authorized and confirmed by the statutes of the United States. Section 737, R. S. U. S.

Having come to the conclusion that the circuit court of the United States had jurisdiction to proceed in the action in the absence of the trustee, it follows logically that the court had the power to determine whether the trust created by Smith in favor of his wife was created in fraud of his creditors; and the judgment of that court declaring that such trust was created in fraud of such creditors, bars Smith and his wife, and all parties claiming under them subsequent to the commencement of the action, as against the purchaser under the judgment in such action, from setting up any rights under or by

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virtue of such trust. As was said in the case of *Watson v. Le Row*, *supra*, the purchaser under such a judgment would certainly have as good a claim to the property as against the trustee, as though the creditors who were plaintiffs in such action had issued execution upon the judgment and sold the lands in question, and he had purchased them at such sale. In that case there can be no doubt but that the purchaser could have maintained an action of ejectment upon the deed issued upon such sale, and have recovered in such action, provided upon the trial he could establish the fact of the fraudulent nature of the trust estate as to the creditors. See *Sands v. Hildreth*, 14 Johns. R., 493; *Jackson v. Terry*, 13 Johns. R., 471; *Moore v. Munn*, 69 Ill., 591. In the case at bar, it seems to me that if the present defendant and respondent had brought an action of ejectment against the purchaser from the trustee, the present plaintiff, the only question which would be open to litigation would be, whether he had purchased in good faith without notice of the claims of the plaintiffs in such former action, unless it appeared that the trustee had some claim or lien upon such property for money expended in the execution of the trust, or for services as such trustee, which might be paramount to the claim of the plaintiff. The judgment in the United States circuit court having barred all right of the *cestui que trust* to claim any interest under the trust deed as against such plaintiff, the trustee and those claiming under him could not set up the rights of such *cestui que trust* as a foundation of title, unless they brought themselves within the rule which protects purchasers in good faith without notice of the invalidity of the trust.

In the creditor's action, the plaintiffs and the defendant A. M. C. Smith both claimed under the grantor of the trust, A. Hyatt Smith. At the time of the commencement of that action, the legal title to the real estate in controversy was in A. Hyatt Smith, the mortgage to the trustee not having at that time been foreclosed. A. M. C. Smith being a party to

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such action, and being the sole person having any interest in the mortgage given to the trustee, she was the proper party to contest with the creditors of the mortgagor the validity of such mortgage. She did contest its validity with such creditors, and judgment was rendered adverse to her right. She is therefore barred from asserting any title to the real estate in question as against those claiming under the judgment in the creditor's action. If she had bought the lands in question upon the foreclosure sale, or if, after the trustee had purchased them at such sale, he had conveyed them to her, there could be no doubt as to the right of the purchaser under the creditor's judgment to recover against her in an action of ejectment, upon the ground that as between them it was *res adjudicata* that the mortgage was fraudulent and void, and no title could therefore be acquired by her under the same. *Macey v. Fenwick*, 9 Dana, 198, 200. As she is barred from asserting any right to the lands in controversy under such mortgage, it seems necessarily to follow that the trustee cannot hold the same, as against a purchaser under the judgment in the creditor's action, for her benefit.

It is claimed by the learned counsel for the appellant, that, notwithstanding it may be held that the title of the trustee is void as to the respondent, yet the appellant's title should be sustained on the ground that he is a purchaser in good faith from the trustee, without notice of the claim of the respondent or those under whom he claims. It is urged that at the time of the purchase by the appellant from the trustee, such trustee had apparently the legal title to the lands in question, so far as such title was disclosed by the records in the county where the lands were situated. The appellant's deed from the trustee was made February 28, 1873. The judgment under which the respondent claims was not entered until July, 1874, and the sale at which he purchased was made in 1875. The creditor's action under which such sale was made was commenced, however, in June, 1858, and was pending and

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undetermined in February, 1873, when the respondent took his conveyance. Did the appellant purchase without notice of the claims of the creditors under whom the respondent held his title, and for a valuable consideration? If he did, then, notwithstanding the fact that the court has declared the trust fraudulent and void as to such creditors, his title would be good. We are inclined to hold that he did not purchase in good faith, without notice and for a valuable consideration:

1. Because he must be held to be a purchaser *pendente lite*, and therefore took his title subject to the judgment of the court in the creditor's action, and is bound by such judgment to the same extent as the parties to the action. If the trustee had had the power under the trust deed to sell and convey the trust property, as he might in his discretion see fit, without consulting with or procuring the consent of his *cestui que trust*, it might be insisted with much force that a purchaser from such trustee would not be bound to examine or ascertain whether the interest of the *cestui que trust* was in litigation or not, so long as the trustee was not a party to such litigation. In such case, so long as the parties were contesting only as to the rights and interests of the *cestui que trust*, persons dealing with the trustee might take it for granted that all parties interested in the trust estate were satisfied to let the trustee exercise his discretion in the disposition of the trust property, relying upon his good faith to act for the interest of all parties concerned. In such case, a sale made by the trustee in good faith to a purchaser in good faith would undoubtedly pass the title to the purchaser discharged of the trust, and the consideration paid would be held by the trustee subject to the rights of the parties claiming the proceeds of the trust estate. But in the case at bar, the trustee had no power under his deed of trust to sell the property to any person or persons except as directed in writing by the *cestui que trust*, and all parties dealing with him were, therefore, bound to take notice of that fact. The power to sell was, in fact, reserved by the trust deed to

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the *cestui que trust*, and not given to the trustee; and, although the mere legal title was in the trustee, the entire equitable estate and title was in the *cestui que trust* (*Sparhawk v. Cloon*, 125 Mass., 267), and every purchaser of the trust estate or any part thereof was therefore a purchaser in fact from the *cestui que trust*. The trustee acted more in the nature of an agent of the *cestui que trust* than otherwise, in the conveyance of the title of the property sold by the *cestui que trust*. In such case, we think the purchaser of the trust property was bound to know whether the title of such *cestui que trust* was in litigation when he negotiated for a purchase, and if he purchased pending such litigation he purchased with constructive notice of the rights of the litigants, and was bound by the judgment.

2. But, independent of the fact that he purchased the property *pendente lite*, and was therefore bound by the judgment in the creditor's action, there is no evidence in this case that the appellant purchased for a valuable consideration, in good faith and without notice in fact of the rights and claims of the creditors of Smith. As the evidence in the record shows that respondent has the title to the lands in controversy except as against a purchaser in good faith for a valuable consideration and without notice of his rights, the appellant, in order to defeat this title of the respondent, was bound to establish by proof on his part that he was such purchaser, before he could ask the court to adjudge that the respondent should release his claim to him. *French v. Loyal Co.*, 5 Leigh, 640; *Jerrard v. Saunders*, 2 Ves. Jr., 456; *Wallwyn v. Lee*, 9 Ves. Jr., 31-2; *Boon v. Chiles*, 10 Peters, 211; *Simson v. Hart*, 14 Johns., 63, 74; *Anderson v. Roberts*, 18 Johns., 516.

It is clear, therefore, that the respondent has shown in himself such a title and interest in the lands in dispute as must defeat the appellant's claim to the relief asked for in this action, unless he is barred from setting up such claim as against the appellant, by reason of the proceedings and judgment in the action commenced by the trustee in the circuit court for

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Rock county for the foreclosure of the mortgage given to him by Smith.

It is argued by the learned counsel for the appellant, that, as the plaintiffs in the creditor's suit, under whom the respondent claims title, were made parties defendant to such foreclosure action, and suffered the bill to be taken as confessed against them, they are now barred from alleging that such mortgage was fraudulent and void as to them and that their rights as judgment creditors of the mortgagor are paramount to the claim of the mortgagee.

In answer to this claim on the part of the appellant, it is insisted that there are two reasons why such judgment does not bar the respondent and those under whom he claims: *first*, that the claims of the judgment creditors were prior and paramount to the claim of the mortgagee, and that, therefore, the foreclosure of the mortgage does not cut off or bar their rights — that they were not compelled to litigate their rights in such foreclosure action, and such rights are not affected by the foreclosure; *second*, that the creditors, having first commenced their action in the United States circuit court to enforce their claims against the property of their judgment debtor, had the right to have their claims adjudicated in that action in that court, and the commencement of the foreclosure action subsequently thereto, and making them defendants therein, could not deprive them of that right.

Whether the question of the priority of the right of the judgment creditors, as against the mortgagee, could have been litigated in the foreclosure action, may be a question of some doubt. There would seem to be no impropriety in allowing a subsequent judgment creditor, when made a defendant in a foreclosure action, to defend the action by showing that the mortgage was fraudulent and void as to him, and that, although his judgment lien is subsequent in time to that of the mortgage, yet it is in fact prior and paramount to the lien of the mortgage. Such a defense would not be a counterclaim,

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unless the creditor asked affirmative relief, and there would be no question upon such an answer, as a mere defense, whether the proper parties were in court to permit such matter being set up by way of counterclaim for the purpose of having the mortgage set aside and declared void as to such defendant, or to have the foreclosure proceed, and a sale made, and the proceeds applied to the payment of the judgment creditors, before applying the same to the satisfaction of the mortgage.

If the judgment creditors had desired to litigate their rights in the foreclosure action, for the purpose of having their judgment paid out of the proceeds of the sale before applying the same to the payment of the mortgage debt, and for that purpose it was necessary that the *cestui que trust* should be a party to such action, it is probable that upon their application she would have been made a party so as to enable them to litigate their claim in that action.

There are precedents for this practice, and we see no serious objection thereto. *Horn v. Volcano Water Co.*, 13 Cal., 62; *Coster v. Brown*, 23 Cal., 142; *Lord v. Morris*, 18 Cal., 482; 2 Jones on Mortgages, § 1441; *Union Bank v. Bell*, 14 Ohio St., 200; *Dawson v. Danbury Bank*, 15 Mich., 489.

Whether the judgment creditor must avail himself of this right to litigate the question of the validity of the mortgage in the foreclosure action, or be barred from setting up such invalidity in another action, may admit of grave doubt. It may be urged with great plausibility, that unless the complaint in the foreclosure action contains other allegations than the general one that the claim of the judgment creditors is subsequent and subject to the claims of the mortgagee, if such creditors suffer judgment to be taken by default, such judgment has no other effect than to bar such defendants from the right of redemption as subsequent judgment creditors, and does not bar them from alleging and showing that the mortgage is in fact fraudulent and void as to them. But as we prefer to place the right of the judgment creditors in this case

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upon the ground that, as their action in the United States circuit court to avoid the mortgage was commenced before the foreclosure action, they had the right to pursue their remedy in that court, and were not, therefore, called upon to assert their right in the foreclosure action, we shall not continue the argument upon this point. We are of the opinion that the second reason assigned by the respondent why the judgment in the foreclosure action does not bar the respondent from attacking the validity of the mortgage given to the trustee, and his title acquired by the sale under the judgment therein, is conclusive against the appellant, and that the judgment in that action, and the sale made in pursuance thereof, have no effect upon the rights of the respondent in this action. Their only effect, if any, was to change the claim of the trustee to the lands in controversy from a mortgage lien to a legal title in trust. The authorities upon this point are numerous, and seem to settle the point beyond any doubt, and are clearly in accord with reason and justice. It would hardly have been questioned, even by the learned counsel for the appellant, that, if the trustee, as well as the *cestui que trust* and the grantor of the trust estate, had been a party to the creditor's action, the judgment in such action would have been conclusive as to the rights of the creditors, notwithstanding the judgment and sale in the foreclosure action; but as we hold that the absence of the trustee as a party to such action did not affect the jurisdiction of the court, nor render it powerless to pass upon the rights of the *cestui que trust* as against the rights of the creditors, and declare the mortgage void as to them, the trustee cannot, in another action, again litigate with such parties the same question. His right to hold the property, as against the creditors of the grantor of the trust estate, depends upon his right to execute the trust in favor of the *cestui que trust*; and, as between her and the creditors, the court has adjudged that it cannot be so executed.

The creditors, before any action was commenced by the

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trustee to foreclose his mortgage, commenced an action, as they had the right to do, in the circuit court of the United States, for the express purpose of avoiding the mortgage on the ground that it was fraudulent and void as against them, and for the purpose of subjecting the mortgaged property to the payment of their judgments. According to all the authorities, they had the right to have the judgment of that court upon the matters sought to be litigated in that action; and neither the parties to such action, nor any other person acting in their behalf and solely for their benefit, could compel the plaintiffs in such action to go into some other court and there litigate their rights. This rule was very clearly and forcibly stated by Justice GRIER in *Peck v. Jenness*, 7 How. (U. S.), 612, 624-5. The facts in that case were as follows: The plaintiffs in the action brought suit against the defendants in the court of common pleas of Cheshire county, New Hampshire, and attached the property of the defendants, as they were authorized to do by the laws of that state. The cause was continued, and in the meantime the defendants were declared bankrupts, an assignee in bankruptcy was appointed, and such assignee was made a defendant in the action. The assignee pleaded the bankruptcy of the defendants, their application for the benefit of the bankrupt law, his appointment as receiver in such proceedings, and the discharge of the defendants by the court in the bankrupt proceedings. To this answer the plaintiffs replied that they had attached certain goods of the defendants in good faith before the defendants had made application for the benefit of the bankrupt law, and asked that execution might be levied upon such goods so attached to satisfy their claims. To this reply the defendants rejoined that the assignee had presented to the district court of the United States a petition setting forth the plaintiffs' attachment of the goods, and averring that such attachment was not a valid lien on said goods, and that therefore the sheriff had no right to retain them, and prayed the court that the sheriff should deliver the

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goods to the assignee or account for their value; and that the court, after notice to the parties and hearing, had decreed accordingly. To this rejoinder the plaintiffs demurred, and judgment was rendered in favor of the plaintiffs for the amount of their claim, and directing the amount to be levied and collected out of the goods attached in the action. This judgment was affirmed in the highest judicial tribunal of the state, and such judgment was removed by a writ of error to the supreme court of the United States. The first question considered in that court was, whether the plaintiffs, by virtue of their writ of attachment, had a lien upon the goods attached which was not divested by the bankruptcy of the defendants; and the supreme court of the United States held, with the state court, that this lien was not divested by the subsequent bankruptcy of the defendants, and their application to be discharged under the bankrupt law. The second question was, whether the adjudication of the bankrupt court that the plaintiffs had no lien upon the goods by virtue of their attachment, was conclusive against them, and a bar to their claiming such lien. Upon this point the learned justice, in his opinion holding that the plaintiffs were not concluded by such judgment of the district court of the United States, says:

“The district court has ‘exclusive jurisdiction of all suits and proceedings in bankruptcy.’ But the suit pending before the court of common pleas was not a suit or proceeding in bankruptcy, and, although the plea of bankruptcy was interposed by the defendants, the court was as competent to entertain and judge of that plea as of any other. It had full and complete jurisdiction over the parties and the subject matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was an independent tribunal, not deriving its authority from the same sovereign, and, as regards the district court, a foreign forum in every way its equal. The district court had no supervisory power over it. . . . It is a doctrine of law too long

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established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; *and the right of the plaintiff to prosecute his suit in it having once attached, that right cannot be arrested or taken away by proceedings in another court.* These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. . . . It follows, therefore, that the district court had no supervisory power over the state court, either by injunction or the more summary method pursued in this case, unless it has been conferred by the bankrupt act. . . . Instead of drawing the decision of the case into the district court, the act sends the assignee in bankruptcy to the state court, where the suit is pending, and admits its power to decide the cause. . . . An attempt to enforce the decrees set forth in the rejoinder would probably have met with resistance, and resulted in a collision of jurisdictions much to be deprecated."

The rule laid down in this case has been followed in very many cases in the courts of the United States, as well as in the state courts. *Wallace v. McConnell*, 13 Peters, 146; *Campbell v. Emerson*, 2 McLean, 30; *Smith v. M'Iver*, 9 Wheat., 532, 535; *Gaylord v. R. R. Co.*, 6 Bissell, 286, 290, 293; *Union Trust Co. v. R. R. Co.*, id., 197; *Williams v. Benedict*, 8 How., 107; *Wiswall v. Sampson*, 14 How., 52; *Peale v. Phipps*, id., 368; *Pulliam v. Osborne*, 17 How., 471, 475-6; *Orton v. Smith*, 18 How., 263; *Hagan v. Lucas*, 10 Peters, 400; *Taylor v. Carryl*, 20 How., 583; *Freeman v. Howe*, 24 How., 450; *Taylor v. The Royal Saxon*, 1 Wall. Jr., C. C. R., 311; *Withers v. Denmead*, 22 Md., 135, 145; *Brown v. Wallace*, 4 G. & J., 497; *Brooks v. Delaplaine*, 1 Md. Ch.

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Dec., 351. In the last case, the learned chancellor says: "The rule established by that case [referring to the case of *Brown v. Wallace, supra*], both by the reasoning and the judgment of the chancellor, and by the court of appeals, is this: that where two courts have concurrent jurisdiction over the same subject matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres and on the same subjects and persons. . . . The only course of safety, therefore, is, when one court, having jurisdiction over the subject, has possession of the case, for all others, with merely coördinate powers, to abstain from any interference. Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results." The doctrine of the above cases was recognized by this court in *Wood v. Lake*, 13 Wis., 84-94. Chief Justice DIXON, in his opinion in that case, says: "It would be irrational and absurd to say that the court which had first acquired jurisdiction should arrest its proceedings because the court of another government, having concurrent jurisdiction over the same subject matter and parties, had *subsequently* attempted to take jurisdiction of the case; and particularly would this be so when the court which had first attained jurisdiction is clothed with ample power, and would, if asked, give to the plaintiffs in the second action the relief to which they might be entitled."

These authorities are a complete answer to the claim that the respondent, and those under whom he claims, are barred from disputing the validity of the mortgage by reason of the proceedings and judgment in the action to foreclose the same by the trustee. The plaintiffs in the creditor's action did not appear in the foreclosure action; the process was not personally served upon any of them; they waived nothing, therefore, by coming into that court and submitting their rights to its judgment; and it does not appear from the evidence that they

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ever had in fact any knowledge of the pendency of such action. In such case, in the forcible language of Chief Justice Dixon, "it would be irrational" to hold that the proceedings in the subsequent foreclosure action, in which they might possibly have contested the validity of the mortgage had they had knowledge of the pendency of such action, should render absolutely void and ineffectual the judgment which, after a struggle for years, they had succeeded in obtaining in the action commenced by them long before such foreclosure suit was commenced, and by the commencement and prosecution of which they had fully notified the parties who were beneficially interested in such mortgage that they denied its validity as to them, and sought the judgment of the court declaring it invalid and void.

Suppose, in this case, the creditors had appeared in the foreclosure action, and had set up as an answer these proceedings in the circuit court of the United States, and asked the court to render a judgment in such foreclosure action saving the right to them to contest the validity of the mortgage as to them in the action then pending in the United States circuit court, and the circuit court of Rock county had refused to render a judgment according to such request, and had rendered a judgment such as was rendered in such foreclosure action, and this court should be of the opinion that such judgment would, in the absence of the fact that a former suit was pending involving the validity of the mortgage as to such creditors, be conclusive upon them that it was not fraudulent and void: then we would have the case of two judgments in two courts, both having jurisdiction of the subject matter, and both deciding the same questions in issue, and deciding them adversely to each other. In such case, according to all the decisions above cited, the maxim, *Qui prior est tempore, potior est jure*, must govern, and the judgment in the action first commenced must prevail. Any other rule would lead to collisions between courts, which would be likely to defeat the

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ends of justice, and bring the courts of different sovereignties into unseemly conflict with each other.

The claim on the part of the learned counsel for the appellant, that the reservation of the rights of the trustee in the judgment in the creditor's action rendered such judgment a mere nullity so far as the trust estate was concerned, cannot be sustained. We think it very clear that such reservation was intended to protect, and only protected, such rights as the trustee had, if any, in the property, which he did not hold for the benefit of the *cestui que trust*. Any other construction of the judgment would render it a mere piece of waste paper. Under the reservation in such judgment, any interest or title Mead had in the premises, which was not held by him in trust for the parties to that action, was not and could not be affected thereby, and he and his grantees would not be barred by such judgment from setting up such title against the purchasers under such judgment; but such judgment was an effectual bar against Mead's right to hold such property for the mere use and benefit of the *cestui que trust*. As to her the court had the right to adjudge, and did adjudge, that she could take nothing as against the creditors under such deed to Mead. After such judgment Mead could no longer hold the property for the *cestui que trust*. He could not hold it in his own right, and he must therefore hold it for the benefit of those persons to whom it was adjudged to belong, unless he could show that he held it by some other title than that given to him by his trust deed.

The view we have taken of this case renders it unnecessary to discuss very many of the questions which were raised upon the argument, and discussed with great ability by the learned counsel for the respective parties.

Having come to the conclusion that the judgment of the United States circuit court, and the sale thereunder, divested Smith, the mortgagor and grantor of the trust estate, as well as Ann M. C. Smith, the *cestui que trust*, of all interest in the

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lands in controversy, as against the respondent; that the respondent was not estopped from setting up the invalidity of the mortgage in trust by reason of the foreclosure judgment and sale in the circuit court of Rock county; and that the appellant has not shown himself entitled to be protected against the claim of the respondent as a *bona fide* purchaser for a valuable consideration without notice — it is clear that the appellant is not entitled to the relief demanded by him in this action, beyond that relief granted to him by the judgment of the court below. Such judgment must therefore be affirmed.

By the Court. — Judgment affirmed.

RYAN, C. J., and ORTON, J., dissented.

A motion by the appellant for a rehearing was denied, and the following opinion filed, February 3, 1880.

TAYLOR, J. The learned counsel for the appellant moves for a rehearing in this case, mainly upon the ground that this court erred in not reversing that part of the judgment of the circuit court which adjudges "that the plaintiff was not the owner of the land under the mill-race; nor of the roadway along the race; nor of the dam mentioned in the complaint; nor of that portion of lot 2 in block forty (40), and of lot 25 mentioned in said judgment, on which the dam rests and abuts."

It is insisted by appellant's counsel that this finding is inconsistent with another finding of the circuit court, to wit: "That the plaintiff was the owner and in possession of the undivided three-fourths of said lot 25, and of lot 2, block 40, except the parts of the same on which the dam now rests and abuts."

He argues that the two findings cannot stand together, for the reason that the same evidence which shows that the plaintiff is the owner of the three-fourths of lot 25, and lot 2,

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block 40, not covered by the dam, shows with equal clearness that he is the owner of the parts under the dam.

So far as the plaintiff shows any title to lot 25, such title is founded upon a tax deed issued by the city of Janesville, by which the city conveyed said lot 25 to one Marrietta F. Ford, bearing date July 31, 1865, and recorded in the office of the register of deeds for Rock county, on the third day of March, 1870.

It will be found by an examination of the findings of the learned circuit judge, that as to those lots and parts of lots, the title to which he found to be in the plaintiff, he also found that the plaintiff was in the actual possession thereof at the time this action was commenced; and as to those parts of such lots, the title to which he found was not in the plaintiff, he found that the plaintiff was not in the actual possession thereof at that time. After a careful consideration of the evidence upon this latter question, we think the circuit judge was clearly justified in finding a want of actual possession of that part of lot 25 and lot 2, block 40, upon which the dam rested. Without examining the mass of testimony in the case, it will be sufficient, perhaps, to show that the learned circuit judge was justified in finding that the plaintiff was not in the actual possession of the dam and the land under the same, before and at the time of the commencement of this action, to refer to the bill filed by Mead as trustee of A. M. C. Smith, in 1874, signed by the counsel for the present plaintiff and the husband of the *cestui que trust* of Mead, in which it is alleged that said Mead, as to the undivided three-fourths thereof, had enjoyed the quiet and peaceable possession of said lands, dam and water-power for ten years and upwards, and that the said A. M. C. Smith was the owner and in possession of the remaining undivided one-fourth part, and had been for the same length of time.

The evidence in the case clearly shows that neither the grantee in said tax deed nor the plaintiff under her had any

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actual, exclusive possession of the dam or the lands under the same, up to the time of the commencement of this action in 1875. And, under the repeated decisions of this court, the grantee in a tax deed loses all title under such deed when the possession of the premises conveyed remains in the occupation of any person other than the grantee or those claiming under him for three years after the date of such tax deed, under the general law; and under the charter of the city of Janesville such grantee would lose all claim to the lands so possessed after the expiration of one year from the date of the record. *Edgerton v. Bird*, 6 Wis., 527; *Falkner v. Dorman*, 7 Wis., 388; *Knox v. Cleveland*, 13 Wis., 245; *Parish v. Eager*, 15 Wis., 532; *Sprecher v. Wakeley*, 11 Wis., 432; *id.*, 442; *Lewis v. Disher*, 32 Wis., 504. Where the possession is disputed during the three years after recording the deed, the tax claimant loses his title unless he brings his action within the time limited. *Jones v. Collins*, 16 Wis., 594.

These decisions were all made under the R. S. of 1849, ch. 16, sec. 123. But it will be seen that section 21, subch. VII of ch. 474, P. & L. Laws of 1866, being the city charter of Janesville, is the same as section 123, ch. 16, R. S. 1849, limiting the period to one year instead of three, and adding the word "assessments" after the word "taxes." This latter section having been passed after repeated decisions of this court holding that it was, in the language of the court in the case of *Falkner v. Dorman*, "a two-edged sword, cutting both ways, and operated in favor of the possessor, to bar the title of whichever party was under the necessity of resorting to legal proceedings to obtain actual possession within the three years next after recording the tax deed," must receive the same interpretation given to said section 123, ch. 16, R. S. 1849. If, therefore, any person remained in the actual possession of the land deeded by the city of Janesville for taxes, for more than one year after the recording of the tax deed, other than the grantee in such deed, or some one claiming under him, the

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title of such grantee fails, and he can maintain no action thereafter to recover the lands so possessed.

Nor do we think that under this rule the circuit judge was necessarily inconsistent in his findings. If the proof showed that the plaintiff took actual possession of that part of lot 25 not covered by the dam, within one year after the recording of his deed, then, as to that part of the lot, his title became perfect. If the grantee in a tax deed covering eighty acres gets peaceable possession of forty acres thereof within the time limited, and holds such possession until after the expiration of such time, there does not appear to be any good reason why his title to such forty acres should not be considered perfected, although the other forty acres may have been occupied by another party, adversely to his title, during the whole period of such limitation. In such case the result must be that the title is perfected in the tax-title grantee, as to the one forty acres, and avoided as to the other. So in the case at bar. If that part of lot 25 upon which the dam did not rest, was taken possession of within the year after the recording of his tax deed by the plaintiff, as to that part his title is perfect; and if that part of the lot covered by the dam was not taken possession of, and was in fact in the possession of others holding adversely to his tax title, and remained so until the expiration of the year, then as to that part of the lot the tax-claimant's title failed. *Wilson v. Henry*, 35 Wis., 241; *Pepper v. O'Dowd*, 39 Wis., 538; *Coleman v. Eldred*, 44 Wis., 210.

Without discussing the question whether lot 25 necessarily extended to the center of the river, and therefore the half of the dam was situated thereon, we are of the opinion that the plaintiff, by virtue of his tax deed, established no title to that part of the lot upon which the dam rested, though the lot did extend to the center of the river.

For the same reasons above stated, the tax deed of the lands under the raceway conveyed no title to the grantee named therein. They were all recorded more than one year previous

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to the commencement of this action, and the evidence shows that the raceway was occupied by persons claiming in hostility to such tax deeds from the date of the recording thereof down to the commencement of this action.

Without determining the point, we think it probable that the learned circuit judge was right in holding that the lands under the raceway constructed for the benefit of all the owners of lots along which it ran, could not be assessed and taxed separately from the lots it was intended to benefit and did in fact benefit. The case of *Spensley v. Valentine*, 34 Wis., 154, goes very far in support of the opinion of the circuit judge. The race and roadway having been constructed for the sole purpose of accommodating the lots abutting thereon, it is probable that all those who purchased the adjoining lots with the right to draw water from such race, would take title to the lands under the race and roadway opposite their respective lots. See *Pettibone v. Hamilton*, 40 Wis., 402. It is, however, unnecessary to decide that question in this case. It is sufficient, to defeat the plaintiff's title under his tax deed, that the possession of the same remained in persons holding hostile to his tax title claim for more than one year after the same were recorded.

The plaintiff showed title to the undivided three-fourths of lot two (2), block forty (40). This lot lies on the east side of the river, and at the east end of the dam. The court below, without questioning the theory of the law in this state, that a lot bounded by a navigable stream takes to the center or thread of the river opposite, and that a conveyance of such lot by the owner thereof, in the absence of evidence showing that the contrary was intended, will carry the title to the center of such stream, held that the plaintiff, under his title to lot 2, of said block, did not take any part of the dam or the lands under the same.

The original owners of lot 2, block 40, having title to the center of the river opposite thereto, it was competent for them

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to separate the title and ownership of that part thereof lying under the stream from that lying upon the bank; and if the title was so separated by the act of the owner, before his conveyance to the person under whom the plaintiff now claims title, then the subsequent conveyance of said lot 2 by general description would not convey the title to that part of it which had been separated therefrom, and upon which the dam in fact rested. It is argued with great force and ability by the learned counsel for the respondent, that the evidence clearly established the fact that the dam and the lands upon which the same rests and abuts, were treated as entirely separated from lot 25 at the one end, and lot 2 at the other end thereof; and that in the conveyance of these lots, after the erection of said dam, there never was any intention to convey any part of the dam or the land upon which the same rested. The court below found, in substance, that the parts of the lots upon which the dam rested, had been separated from the parts of said lots outside of the bed of the river; and that the conveyance of lot 2, block 40, long after the erection of said dam, by its general description, did not convey the title to the land, under the law, or any part thereof.

We are inclined to hold that the evidence justifies this finding. It appears that the owners of lot 2, block 40, and the lands adjoining the river on the west side thereof, where the dam is now situated, obtained from the state a right to construct a dam across the river at that point for hydraulic purposes, and to sell and lease the right to use the water from such dam. Without this grant from the state, the owners of said lands, though owning the soil under the river, had no power to construct a dam thereon.

Acting under this authority from the state, a dam was built across the river as early as 1846, and has been maintained there from that time to the present. The owners of the dam, previous to the date of the conveyance of said lot 2 under which the present plaintiff claims, had sold and leased the

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right to use the water from said dam in large quantities, and for large sums of money paid therefor; in which conveyances the grantees, their heirs and assigns, bound themselves to contribute to the maintenance of said dam in the future, in proportion to the number of square inches purchased by them respectively. This covenant has been construed to mean that the amount to be contributed by each should be in the proportion as the number of square inches purchased is to the whole number of square inches which the dam furnished. These leases and conveyances gave to the grantees and lessees, their heirs and assigns, the right to maintain said dam across the river where the same was located; and no subsequent conveyance by the original owners of the dam itself, or of the lots at the end thereof, could take away such right. If, in the exercise of the right given by the law authorizing the construction of the dam, the owners thereof had sold all the water which the dam afforded, with covenants on the part of their grantees, their heirs and assigns, to keep up and maintain the same, it seems to us that if the original owners had retained the title to the lots on either side of the river at the ends of the dam, they would have had no title left to the dam itself or the lands upon which it rested, but that such title and right would have passed to their grantees, who had covenanted to keep the same in repair and who would be the only persons interested in its future maintenance. Such owners having sold the dam itself, and the perpetual right to maintain and use the same, the title to the land upon which the same rested passed to their grantees.

This seems to have been the view taken of it by the owners of the dam, as the evidence clearly shows that they have gone on selling and leasing the right to use the water from the dam long after the title to this lot 2, block 40, had passed from their ownership. And it would seem from the evidence that this must have been done with the knowledge and acquiescence of the plaintiff after he acquired the title to the lot under

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which he now claims to own the east half of the dam, or the lands under the same.

It seems clear to us that, when the original owners had conveyed all the water afforded by the dam, and had relieved themselves from maintaining the same by covenants requiring the grantees to maintain it, such grantees would own the same as tenants in common, each owning such proportion as his quantity of water bore to the whole quantity afforded by the dam. Certainly, after such conveyances, the owners of the water would have the power to remove the old dam if they saw fit, and construct a new and better one for their use. The right granted to the original owners to build and maintain a dam across the river at that place would have passed from the original owners to their grantees. And under such grant from the state no further right would remain in them to build or maintain a dam at that place. If the dam itself and the perpetual right to maintain the same passed to the grantee of the original owners, then it seems to us that the original owners' title to the land under the dam would pass also, under the well established rule of law that a deed conveying a house, unless it be clearly made to appear that it was intended that the house should be removed by the grantee, would convey the lands upon which the house was situated. Angell on Water-Courses, §§ 155, 155 *a*, 156, 157, 157 *a*; 3 Washburn on Real Property, 389 and side p. 623, and cases cited; *Blain v. Chambers*, 1 S. & R., 169; *Bacon v. Bowdoin*, 22 Pick., 401; *Whitney v. Olney*, 3 Mason, 280; *Forbush v. Lombard*, 13 Met., 109; *Morton v. Moore*, 15 Gray, 573; *Owen v. Field*, 102 Mass., 102; *Hapgood v. Brown*, 102 Mass., 453; *Prescott v. White*, 21 Pick., 341; *Moulton v. Trafton*, 64 Me., 222.

We do not know, from the evidence in this case, that the owners of the dam have granted or leased all the water which the dam affords, and we take it for granted that they have not. We have stated what we think would be the condition

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of things if such had been the fact, for the purpose of showing the effect which the granting of a portion of the water afforded by the dam must have upon the title to the lands under the same, and the right to maintain it, for the purpose of showing that it was not the intent of the owners in granting lot 2, block 40, to convey the land under the dam or any part thereof.

We think the grants of water from the dam, with covenants compelling the grantees to maintain the same, without granting in terms any interest in the lots at the end of the dam, is strong evidence showing the intention of the owners to separate the ownership of the dam itself, and the power created thereby, from the mere ownership of the lots at the ends thereof; and this is strengthened by other acts of the owners of lot 2, indicating such intention. In the several conveyances of said lot it is evident, from the value placed thereon, that there was no intention of vesting in the grantees of such lot any title or interest in the dam or water-power. While the dam and water-power is valued by the original owners at several hundred thousand dollars, this lot is valued, at the very highest, at \$4,000 or \$5,000, and was in fact bargained away by Coulton, under whom the present plaintiff claims, in 1861, for less than \$400. It would seem that Coulton, when he owned it in 1861, could not have considered that, as a part of it, he owned half of the dam and water-power. Without reviewing in detail the evidence tending to establish the fact that the title to the east half of the dam and the bed of the stream under the same did not pass to the grantee of lot 2, block 40, we think the evidence very clearly shows that it was not the intention of the original grantors that such title should pass by such deed, and that the grantee of such original owners, and his grantees, understood, when such conveyances were made to them, that there was no such intention. The building of the dam under the authority of the state and selling the right to use the water therefrom, with covenants on the part of the

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grantees, their heirs and assigns, to maintain such dam forever thereafter, without conveying to them any interest in lot 2, block 40, or lot 25, at either end of the dam, is evidence that the dam and land upon which the same rested, and the water-power thereby created, were treated by all parties as a piece of property separated from the lots at the end thereof. The judgment of the circuit court finding that the plaintiff was not the owner of the land under the east end of the dam was right, and was properly affirmed.

We do not find anything in the argument of the learned counsel for the appellant on his motion for a rehearing, which shakes our confidence in the correctness of our former opinion upon the main question in the case, and shall not, therefore, attempt any further argument in its support.

By the Court. — The motion for a rehearing is denied, with \$25 costs.

BLESCH VS. THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY.

August 16, 1879 — February 3, 1880.

RAILROADS: TRESPASS TO LAND. (1) *Res adjudicata*. (2) *Rule of damages for lands taken for road, by trespass*.

SPECIAL VERDICT. (3) *Abuse of right to such verdict*.

1. It is *res adjudicata* in this case (43 Wis., 183), that plaintiff is entitled to recover all the damages he had sustained up to the commencement of the action, from defendant's trespass in constructing, maintaining and operating its railroad on his land in a public street (only six inches in width of the track being upon said land), and that the fact that a part of the road was at the same time constructed and operated upon adjoining lands not owned by the plaintiff, cannot be considered for the purpose of lessening the damages.
2. Under the constitution and laws of this state, where lands are taken for the purpose of building and operating a railroad thereupon, the "just compensation" which the railroad company is required to pay, includes "the value of the lands actually taken, and the damages sustained by

48	168
77	656
48	168
101	462
48	168
106	102

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the owner by reason of the taking thereof " for such purpose; and the fact that the value of the owner's other lands, adjoining those taken, and used in connection with them, would be diminished by the proximity of the road, if it were built close to but not upon his land, cannot be considered for the purpose of lessening the damages; and an equally liberal rule in favor of the land-owner applies in case of a trespass by an illegal taking for the same purpose.

3. The court below having improperly permitted questions to be propounded to the jury (for special verdict) by which they were required to state, not only the *gross* amount of plaintiff's damages, but the several *items* composing it, and having twice sent them out to reconsider their verdict in consequence of inconsistencies in the answers, and the jury having made successive material changes in their assessments with no apparent reason except to make the general and special assessments consistent, this court holds that there was an abuse of the statutory right to a special verdict, and reverses the judgment on that ground.

APPEAL from the Circuit Court for *Brown* County.

Plaintiff is the owner of certain lots in the city of Fort Howard, on which are located his dwelling and brewery, and whose easterly front is on Pearl street. In November, 1862, defendant built a railroad track along Pearl street; and opposite plaintiff's close, without his consent, it so located its track that a part thereof six inches in breadth (as the complaint alleges) is west of the middle of the street, and so upon land the fee of which is in the plaintiff; and from that time down to the commencement of this action in September, 1874, it had continuously run its locomotives and cars over said track; and no proceedings had been had to condemn the land. This action was for damages for the trespass.

On a former trial, plaintiff recovered a judgment for \$5,425; but, on defendant's appeal, this court reversed the judgment and awarded a new trial. See 43 Wis., 183-197.

On the second trial, the court, at plaintiff's request, instructed the jury substantially as follows:

2. That at the time of the construction of the road plaintiff had a vested private right of free access to and egress from his said lots and the buildings thereon, over and along

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Pearl street in front of the lots, "as the same was and would have continued to be according to the mode of its original use and appropriation by the public."

3. That this was a right of property which could not be materially impaired or destroyed without plaintiff's consent, except upon payment to him of due compensation; and therefore, if defendant's road changed the mode of the original use of the highway, or if it was thereby appropriated by the public to new vehicles and methods of transportation, so as materially to impair plaintiff's said right, he was entitled to recover such damages as would compensate him for the injury.

4. That the measure of these damages was the difference between the annual value of plaintiff's premises with the railroad constructed and operated as it was, and what such annual value would have been had not the railroad been on said street during that time; and that in determining such diminution in the annual value, they might consider the manner in which the road was built along said street in front of said premises, the manner in which and the extent to which it was used and occupied at that place by defendant's cars and locomotives, the situation of the premises in reference to that portion of the road, and the effect which defendant's occupation and use of that portion of the road had upon the reasonable use and enjoyment of the premises and of the improvements thereon.

5. That if defendant's said right of property was materially impaired, they must allow him the damages resulting therefrom from the date of the building of the road in front of his premises until the commencement of the action.

6. That they might consider the purposes for which the premises were used, whether for the business or the residence of plaintiff and his family, and the extent to which the construction and operation of the railroad, by impairing plaintiff's right of property in the street, interfered with the use and enjoyment of the premises; but that they were to consider the

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business transacted by the plaintiff on the premises only for the purpose of determining the annual rental value.

7. That if the running of defendant's cars and locomotives on the street in front of plaintiff's premises created smoke and cast it on the premises, so as materially to impair the reasonable use and enjoyment thereof, they might allow plaintiff reasonable compensatory damages therefor. "The damages you find, if any, on this ground, must be the actual damages, and you must say what the plaintiff ought to have in money, and what the defendant ought to pay, if anything, in view of the discomfort or annoyance to which the plaintiff has been subjected by such smoke during the period between the construction of this railroad in front of his premises and the commencement of this action, avoiding all speculative and fanciful annoyances as grounds of damages. If you find that any damages were sustained by the plaintiff from these causes, you may include it in your estimate of the depreciation of the annual value of the premises under other instructions."

8. That in assessing the damages, if any, however, they must be careful not to include any item more than once, and must give plaintiff actual compensation for his injury, but no more.

9. That in no event must the damages exceed the sum which would be obtained by determining the difference between the annual rental value of the property with the railroad constructed and operated as it was, and what that value would have been if there had been no railroad on Pearl street during that time.

10. That plaintiff had a right to put any lawful improvements on the property after the railroad was built on his land in the street; and that, if any such improvements were made, they were to be considered in determining the subsequent rental value of the premises.

11. That if the construction and operation of defendant's road in front of plaintiff's premises had depreciated their annual value, the jury could not "apportion the damages for

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these injuries according to the width of the strip actually taken and occupied, but must award damages to compensate plaintiff for the whole amount of injuries sustained."

12-14. That if the plaintiff enjoyed any peculiar benefits from the railroad being on this street, such benefits must be deducted from his damages; but that benefits common to the whole community were not to be considered.

15. That the damages allowed to plaintiff must not in any case exceed the market value of his premises when the railroad was constructed.

17. That no remote or speculative damages could be allowed in the action, but only such as were the natural and proximate effect of defendant's acts.

"19. The testimony shows that the effect upon the plaintiff's property rights, as hereinbefore defined, would have been the same whether the railroad actually encroached upon the western side of the street or not. You will therefore assess the damages, if any you find, according to the foregoing instructions, however you may find upon the question of encroachment, which you will determine as a separate question. That is to say, if you find the plaintiff has been injured in his property right, under the foregoing instructions, you will determine the damages for such injury upon the principles hereinbefore stated, whatever you may think as to whether the railroad is upon the western side of the center of the street. You will then determine whether the railroad, or any portion of it, is on the western side of the center of the street; and, if so, how much."

At defendant's request, the court instructed the jury that plaintiff could not "recover anything on account of the depreciation of the rental value of the property caused by danger thereto from fire from defendant's railway."

Of its own motion the court also gave the following instructions:

"Much has been said in the argument of this case upon the

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subject of remote and fanciful injuries and speculative damages, and reference was had specially to testimony offered on the part of the plaintiff tending to show that horses were liable to be frightened by passing trains, and the plaintiff's buildings were in danger from fire from the locomotives. Now, even if you should find that any such inconveniences or dangers were occasioned by the construction and operation of the railroad, they cannot of themselves form a basis for the assessment of damages. By this I mean that you cannot allow any sum of money as damages for the injury from fire, nor any sum as damages for the liability of horses being frightened by passing trains, nor any sum for any other inconvenience or annoyance which might or might not happen, these being remote or contingent injuries, for which the law does not allow damages to be assessed. They are only to be considered for the purpose of determining whether or not the annual rental value of the plaintiff's property on Pearl street was diminished in consequence of the defendant's railroad being operated as it was, in front of the plaintiff's premises. . . . Whatsoever of these hazards and dangers you may find to have caused a depreciation in the rental value of the plaintiff's property, if you do so find, his loss is the same. If, in consequence of its exposure to these remote injuries, the value of the use and enjoyment of the property has been diminished to any extent, then such decrease in value measures the actual loss to the owner. It matters not which of the dangers and inconveniences, if you find they were occasioned by the railroad, caused the depreciation, whether exposure to fire, inconvenience from trains, or danger to persons and property, or whether any or all of these depreciated the rental value. The real question is, whether, in consequence of the railroad where it is, and operated where it was, the rental value of the property was really diminished, and, if it was, how much."

For the purposes of a special verdict, the court submitted

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to the jury certain questions proposed by the plaintiff, others proposed by the defendant, and others drafted by the presiding judge himself. These, with the answers first given thereto, were as follows:

I. Questions proposed by the plaintiff:

1. What, if any, was the total amount of damages suffered by the plaintiff, between November 10, 1862, and September 20, 1873, on account of the construction and operation of the railroad in front of the plaintiff's premises, in getting out ice? [Ans. \$200.]

2. What was the depreciation in the value per year of plaintiff's premises for the purposes of the wholesale business of a brewery, from the construction and operation of defendant's railroad from November 10, 1862, to September 20, 1873, except as to injuries in getting out ice? [Ans. None.]

3. What was the depreciation in value per year of the plaintiff's premises for the purposes of his retail business, from the same causes, for the same period, exclusive of any increased cost in getting out ice? [Ans. \$156 per year; total, \$1,694.33.]

4. What was the depreciation of the value per year of the plaintiff's premises as a residence for himself and family, under the instructions, for the same time? [Ans. \$25 per annum; total, \$271.52.]

5. What was the total amount of damages to the plaintiff by reason of the construction and operation of the defendant's railroad, under the instructions given you? [Ans. \$3,090, composed of items Nos. 1, 3, 4, and third question asked by court.]

6. Do the ends of the railroad track project west of the center of Pearl street, upon the plaintiff's premises? If so, how much? [Ans. Yes. Average, four inches.]

7. Did the edges of the cars of the defendant's railroad, from November 10, 1862, to September 20, 1873, project over the center of the street in passing in front of the plaintiff's

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premises? If so, how much? [Ans. Yes. Average, ten inches.]

II. Questions proposed by the defendant:

1. If, you find that defendant's railway, as maintained and operated prior to the commencement of this action, has caused any depreciation in the annual rental value of plaintiff's premises, how much of such depreciation do you find was caused by the frightening of horses, and by preventing people from coming with teams to plaintiff's brewery to purchase beer or sell barley on account of the liability of horses to be frightened by the cars or engines on defendant's railway? [Ans. Nothing for frightening horses; only the depreciation on retail business as answered in plaintiff's question No. 3.] And how much of such depreciation do you find was caused by the casting of smoke upon or over the plaintiff's premises? [Ans. Nothing.] And how much by the delay of plaintiff's men and teams in getting ice from the river? [Ans. Amount is as answered in plaintiff's question No. 1.] And how much by the increased danger to plaintiff's premises from fire? [Ans. Nothing.] And how much was attributable to the obstruction caused by the railway to the plaintiff, his family, servants and teams, in going to and from his premises, exclusive of any interference in getting out ice? [Ans. The same as answered in plaintiff's question No. 4.]

2. Did the maintenance and operation of defendant's railway in front of plaintiff's premises depreciate the annual rental value of the plaintiff's premises prior to the commencement of this action; and if so, on what grounds or for what causes do you find that such depreciation resulted? [Ans. Yes. Caused by the cars being left on the track opposite the plaintiff's premises, and the general operation of the defendant's railroad.]

3. Did the defendant's railway, as the same was maintained and operated prior to the commencement of this action, cause any depreciation in the annual rental value of the plaintiff's

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premises for the purpose of manufacturing and selling beer, except by reason of frightening horses and causing delay in getting ice from the river? [Ans. No, except the plaintiff's retail business.]

4. From the time of the construction of the railway to the commencement of this action, what was the difference, if any, between the annual rental value of the plaintiff's premises, with the railroad as it was, and operated as it was, and what the annual rental value of his premises would have been if the railway had been located and operated on Pearl street, but wholly east of the center line of Pearl street, opposite the plaintiff's premises? [Ans. None.]

5. Would the injury to the annual rental value of the plaintiff's premises, prior to the commencement of this action, have been any less if the defendant's railway had been situated on Pearl street, but wholly east of the center line of Pearl street; and if so, how much less? [Ans. None.]

6. Did the ties of the defendant's railway, prior to the commencement of this action, extend west of the center line of Pearl street in front of the plaintiff's premises; and if so, how much? [Ans. The same as is answered in plaintiff's question No. 6.]

7. Has the defendant been in the possession of the same ground upon which its railway is now located and operated, since the time the railway was constructed? [Ans. Yes.]

8. Did the plaintiff manufacture and sell more beer after the construction of the railway than before? [Ans. Yes.]

9. From the time of the construction of the defendant's railway to the commencement of this action, what was the difference, if any, between the annual value of the use of the plaintiff's premises to him, with the railroad as it was and operated as it was, and what the annual value of the use of the same to him would have been if the railroad had been located and operated in Pearl street but wholly east of the center line thereof? [Ans. No difference.]

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III. Questions drafted by the circuit judge:

1. If in your answer to the 8th of the defendant's questions, you should find that the plaintiff manufactured and sold more beer after the construction of the railway than before, state what causes produced such increase of his business, and state particularly whether or not such increase was occasioned by the benefits of the railroad to the community in general, or by the location and operation of the railroad through Pearl street in front of the plaintiff's premises. If from either of these, which of them? [Ans. Yes. By increase of population.]

2. If you find that the plaintiff made and sold more beer after the construction of the railroad than before, state whether such increase of his business was greater or less than it would have been if the railroad had not been located and operated upon Pearl street? [Ans. Less.]

3. If you find that the annual rental value of the plaintiff's premises described in the complaint was actually depreciated in consequence of the construction and operation of the defendant's railroad through Pearl street, in front of said premises, what do you find to have been the difference in amount between said rental value, with the railroad where it was and operated as it was, and what the rental value of said premises would have been from the 10th day of November, 1862, until the 20th day of September, 1873, had not the railroad been located and operated through Pearl street?

[Ans. 5100 dollars, less

2010 in plaintiff's questions Nos. 2, 3, 4

—
\$3090.]

The other facts in regard to the verdict are sufficiently stated in the opinion.

The court refused to set aside the verdict, and rendered judgment thereon in plaintiff's favor for \$3,251.96 damages, with costs; and defendant appealed from the judgment.

William Ruger, with whom was *Geo. B. Smith*, for the
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appellant, as to the rule of damages, argued substantially as follows:

If the railway encroached so that an action of trespass would lie, the measure of damages was the natural and proximate injury caused by the maintenance and operation of the railway *on plaintiff's land*. But the question of encroachment was ignored in plaintiff's proofs as to damages; the instructions admitted that the damages sought to be recovered were not attributable to the trespass; and the jury were directed to assess the damages without respect to it. It was maintained that plaintiff had property rights extending beyond his land; and, to show a violation of these rights, and injury resulting therefrom, testimony was received as to the manner of constructing, maintaining and operating the railway in the street at large, and how, by physically obstructing travel, and by frightening horses, it prevented people from coming into the street to do business, and delayed plaintiff in drawing ice across the street, beyond the limits of his land. From the rulings receiving this testimony, the charge relating to plaintiff's private rights in the street, the instructions as to the grounds and measure of damages, and the questions submitted for special verdict, in respect to damages, the jury must have inferred that plaintiff had a private legal right to go and come, personally or by his agents or servants, through all parts of the street, without obstruction or delay; that he also had a legal right to such benefits as would accrue to him from public travel on the street; and that whatever obstructed such travel so as to affect its volume and the incidental benefits flowing from it, was in violation of plaintiff's property rights in the street at large. But in fact plaintiff's right to go through the street beyond the limits of his own land is a mere *public* right, possessed by him in common with all other citizens, and not in any way incident to the ownership of property on the street. Concede that he had a private right, such as a stranger has not, to pass over that part of the street of which he owned

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the fee; concede also that, *as against his grantor*, he had a right, by virtue of his deed, to pass as far as the limits of the land dedicated by his grantor for a street: this is the limit of the rights in the street which he can claim under his deed. All other rights he must get as one of the public, through the dedication made to the public. R. S., sec. 2263. The public may abandon the right thus acquired, by vacating the street or any portion of it; and if this be done, the title of the party making the dedication, or of his grantees, becomes again a fee simple divested of all servitudes or easements. Washb. E. & S., 2d ed., 214; *Kimball v. Kenosha*, 4 Wis., 321. The decisions in *Hegar v. Railway Co.*, 26 Wis., 624, and *Hobart v. Milwaukee City R. R. Co.*, 27 id., 194, 201-2, are in accord with this view. The opinion of this court on the former appeal in the present case also shows that the court regarded the private rights of plaintiff as confined to his land, and the trespass upon his land as his only ground of complaint. See also Dillon on M. C., sec. 527 and note 3, sec. 556; *Davidson v. Railroad*, 3 Cush., 105-6; *Proprietors, etc., v. Railroad Corp.*, 10 id., 388-92; *B. & W. Railroad Corp. v. Old Colony Railroad Corp.*, 12 id., 606-9; *People v. Kerr*, 27 N. Y., 188; *Kellinger v. Railroad Co.*, 50 id., 206. The value of private property in general is more dependent upon the exercise of public rights by the public than upon the exercise of such rights by the owner of the property; but it has never been held that the offer of inducements by which the public are influenced to refrain from the exercise of the public rights, constitutes a violation of any private right incident to the property, or gives the owner any right to compensation. If this were a good ground of action, plaintiff would likewise have an action for the establishment of rival breweries, or for the discontinuance of the ferry which the evidence shows to have existed near him, and for the establishment of a free bridge which drew away travel from Pearl street. *Proprietors, etc., v. Railroad Corp.*, and *B. & W. Railroad Corp. v. O. C.*

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Railroad Corp., supra; Hatch v. Railroad Co., 25 Vt., 58-68; *Richardson v. Railroad Co.*, id., 472-6; *Lansing v. Smith*, 8 Cow., 146-51, 157-8; *Patten v. Railway Co.*, 33 Pa. St., 426. 2. It is settled in this state that injuries resulting from noise, danger of fire, the frightening of horses, etc., causing loss of patronage in business, are not grounds for the assessment of damages. *Snyder v. Railroad Co.*, 25 Wis., 60; *Hutchinson v. Railway Co.*, 37 id., 610-11; *S. C.*, 41 id., 541, 555. The rule thus settled here is the general rule upon the subject. *Presbrey v. Railway Co.*, 103 Mass., 1, 6-7; *Walker v. Railway Co.*, id., 14, 15; *Proprietors, etc., v. Railway Co.*, and *B. & W. Railroad Corp. v. O. C. Railroad Corp., supra; Stadler v. Milwaukee*, 34 Wis., 98; and the other authorities cited *supra*.

For the respondent, there was a brief by *Hastings & Greene*, and oral argument by *Mr. Hastings*:

The damages do not depend on the width of the strip of plaintiff's premises which defendant occupied, but must be measured by the direct and proximate injury caused to his property rights by the operation of the road in front of his premises. It is not true that, had the road been wholly on the eastern side of the street, there would have been no liability. When the power of eminent domain is exercised for a public use, but under the control and for the emolument of a private corporation, such corporation is liable for all the direct and proximate consequences to private property, whether it physically occupies the property or not. The test is, Has there been such an injury to property rights as would be actionable at common law if the injury had been inflicted by an individual without legislative authority? *Alexander v. Milwaukee*, 16 Wis., 248, 255-58; *Hobart v. Railroad Co.*, 27 id., 198; *Arimond v. Canal Co.*, 31 id., 317, 335; *Dela-plaine v. Railway Co.*, 42 id., 214; *Eaton v. Railroad Co.*, 51 N. H., 504, 511-12; *Tinsman v. Railroad Co.*, 2 Dutch., 148; *Fletcher v. Railroad Co.*, 25 Wend., 462; *Mahon v.*

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Railroad Co., Hill & Den., 156; *Robinson v. Railroad Co.*, 27 Barb., 512; *Grand Rapids, etc., Co. v. Jarvis*, 30 Mich., 308; *Cincinnati, etc., Railway Co. v. Cumminsville*, 14 Ohio St., 523; *E., L. & B. S. Railroad Co. v. Combs*, 10 Bush, 382 (19 Am. R., 67); *Protzman v. Railroad Co.*, 9 Ind., 467; *E. & C. Railroad Co. v. Dick*, id., 433; *Pumpelly v. Canal Co.*, 13 Wall., 166; *McCarthy v. Board of Works*, L. R., 7 C. P., 508; *S. C.*, L. R., 8 C. P., 191; *S. C.*, L. R., 7 H. of L., 243; *E. & W. Ind. Docks and B. J. Railway Co. v. Gattke*, 3 Eng. L. & E., 59; *Regina v. Railway Co.*, 2 Ad. & El., N. S., 347; *Cooley's Con. Lim.*, 556, note 2; *Redfield on R. W.*, 2d ed., 175; *Wood on Nuisances*, §§ 751-2. Even if the constitution does not protect the land owner against consequential injuries where his land is not taken into the possession of the company, yet legislative authority to inflict such injury is not embraced in a statutory permission to build a railroad through a street. The company will remain liable for such injuries unless expressly exempted by the statute from such liability. *Fletcher v. Railway Co.*, *Mahon v. Railway Co.*, *Robinson v. Railway Co.*, and *Delaplaine v. Railway Co.*, *supra*; *Chapman v. Railroad Co.*, 33 Wis., 629; 64 Barb., 55; *Wood on Nuis.*, § 750. But even if it were true that defendant would not have been liable at all if the road had not encroached at all upon plaintiff's lots, still the cases are uniform in holding that when a railroad is built upon the soil of an adjoining owner, in a highway, such owner can recover compensation for the whole injury resulting from the operation of the road to his easement in the street and to his adjoining premises — such premises, whether in or outside of the street, being considered one tract, and the right to have the highway continue according to the mode and for the uses of its original appropriation being a right of property annexed to his premises, and “as much property as the lot itself.” *Cox v. Railroad Co.*, 48 Ind., 178; *I., B. & W. Railway Co. v. Hartley*, 67 Ill., 439; *Mix v. Railway Co.*, id., 319; *City of Pekin v. Bre-*

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retion, id., 477; *St. Louis, etc., Railway Co. v. Capps*, id., 607; *E., L. & B. S. Railroad Co. v. Combs*, *supra*; *Harrington v. Railroad Co.*, 17 Minn., 215; 18 id., 260; *S. P. Railroad Co. v. Reed*, 41 Cal., 256; *Williams v. Railroad Co.*, 16 N. Y., 110; *Mahon v. Railroad Co.*, 24 id., 658; *Ford v. Railroad Co.*, 14 Wis., 609; *Hobart v. Railway Co.*, *Chapman v. Railroad Co.*, and *Delaplaine v. Railway Co.*, *supra*; *Cooley's Con. Lim.*, 446-9. In all these cases the compensation allowed included the injury *from the operation of the road*, and not merely the increased injury from the *proximity caused by the taking*. The only case which limits the recovery to such increased injury is *Walker v. Railway Co.*, 103 Mass., 10, 15. Two things are to be observed of this case: (1) It was a statutory proceeding to acquire the title. The taking was lawful. (2) It is based on the doctrine, "no physical appropriation, no damages," which is unsound. 16 Wis., 248; 31 id., 317-335; 42 id., 214. Every decision of this court prescribing the rule of damages for consequential injuries is wrong, if the doctrine of this Massachusetts case is right; for in every case the road might have been run near the premises, without touching them, so as to produce some injury. 33 Wis., 629; *Field on Dam.*, 668.

The appellant's counsel in reply:

Recognizing the fact that the common law was otherwise, Massachusetts and some other states, as well as England, have enacted statutes providing for compensation when lands are injuriously affected by a railway without actual encroachment. Under such statutes, the certain, direct and natural damage resulting from the mere proximity of the railway may be recovered; for the franchise is taken subject to this condition. But at common law damages so resulting from lawful acts have never been deemed actionable. *Cooley's Con. Lim.*, 541-3; *Sedgwick on Con. and Stat. Law*, 519-23; *Potter's Dwaris*, 393; 1 *Redfield on R. W.*, 294, pl. 1, 2, and note 4; *Pierce on Am. Railway Law*, 171, 198; *Dillon on M. C.*, secs.

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556-7, 576-7; Wood on Nuis., §§ 753-7; *Carson v. R. R. Co.*, 35 Cal., 325; *Stadler v. Milwaukee*, 34 Wis., 98; *Whittier v. Railway Co.*, 38 Me., 26; *Boothby v. R. R. Co.*, 51 id., 320; *Richardson v. Railroad Co.*, 25 Vt., 465, 476; *Hatch v. Railroad Co.*, id., 40, 58, 68; *N. Y. & E. Railroad Co. v. Young*, 33 Pa. St., 175; *Patten v. Railway Co.*, id., 426; *Stevens v. Railway Co.*, 5 Vroom, 549-53. 2. Where land is taken and occupied by the railroad company, the common-law rule of damages is, the value of the use of the portion occupied, and the certain, direct and proximate injury to the use of the residue by reason of the occupation of such part. The statutory rule is conformable. The language of such statutes in general is, *the value of the land taken*, and the damage sustained by the owner *by reason of the taking thereof*. Laws of 1872, sec. 16; *Robbins v. Railroad Co.*, 6 Wis., 642; *Hutchinson v. Railway Co.*, 37 id., 609-11; *S. C.*, 41 id., 541. Suppose that plaintiff had owned a hotel-stand which, prior to the construction of the railway, was located at a terminal point or station on a much traveled thoroughfare; and that, in constructing a railway, a small fraction had been taken from one corner of the rear of the premises. The value of the property might not be appreciably affected by the taking of such small portion of land, and yet the property as a hotel-stand might be utterly destroyed by the change worked by such railroad in the modes of travel. In such a case, could it be maintained that a recovery could be had of the whole amount of damage to the plaintiff resulting from the railroad, because a fraction of his land was taken? It has never been so ruled. The fact that it is sometimes difficult to determine the amount of direct and natural damages resulting to plaintiff *from the trespass on his land* (as distinguished from the losses resulting from other causes, which are not actionable), is no reason why the attempt should not be made. *Hobart v. Railway Co.*, 27 Wis., 200. It is not so difficult in the present case as in many of the cases, to determine the extent to which plaintiff's private rights have

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been violated, and to assess the damages therefor. *Janssen v. Lammers*, 29 Wis., 91-2; *Thomas v. Kenyon*, 1 Daly, 132; *Partenheimer v. Van Order*, 20 Barb., 479; *Rogers v. Ins. Co.*, 1 Story, 603; *Russell v. Tomlinson*, 2 Conn., 206; 2 Waterman on Trespass, 292; Angell on W. C., 140 c, and note 4.

The following opinion was filed September 2, 1879.

TAYLOR, J. This case comes before this court a second time upon appeal by the defendant; and, by consulting the arguments of counsel on the former appeal, and the decision of the court, it will be seen that the same questions as to the rule of damages applicable to the case were discussed upon the former appeal that were discussed upon this. So far, therefore, as the decision in the former appeal settled any question as to the extent of damages which the plaintiff may recover in this action, it is *res adjudicata* in this case.

On the former appeal it appears that the learned circuit judge charged the jury, among other things, "that the jury could not apportion the damages for these injuries according to the width of the strip actually taken and occupied by the railroad, but must award damages to compensate the plaintiff for the whole amount of injury sustained;" and that the court refused to give the jury the following instruction: "Plaintiff can recover only such amount of damages as he has sustained by reason of the operation of defendant's road on that portion of the street lying west of the center line and in front of his premises. The company had a right to use and operate their railway on the eastern side of the street."

This court held that such instruction given was a proper instruction as to the rule of damages, and that the instruction requested by the defendant was properly refused. In commenting upon this question of damages, Justice COLE, who delivered the opinion of the court, says:

"In constructing its track upon the plaintiff's land without

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his consent, and without making compensation, the company was clearly a wrongdoer, and is liable for all the certain, direct and natural damages resulting to the plaintiff from its unlawful act. The damages recoverable in the action are, of course, for past injury to the freehold and possession; that is, the pecuniary loss which the trespass had caused the plaintiff in the use and enjoyment of his property when the suit was commenced. Laying out of view collateral questions, for the purpose of this case it seems to be sufficiently accurate to say, that the measure of damages would be the difference between the annual rental value of the premises with the railroad track where it was, and the road operated as it was, and what the rental value of the premises would have been had not the road been upon his land.

“The counsel for the company argued that the plaintiff should recover such damages only as resulted from the six-inch road-bed encroachment upon his premises; such damages as the plaintiff sustained by reason of the operation of the road on that portion of the street lying west of the center line thereof and in front of his premises. If by this it is meant that the plaintiff could recover only a fractional part of the damages which the construction and operation of the road worked to his premises, a bare statement of the proposition is sufficient to show its unsoundness. A railroad is an entire thing, and it is impossible for any human intelligence to separate the loss or injury which its operation causes, apportioning so much to one portion and so much to another. But we suppose the plaintiff was entitled to recover all the loss which he had sustained by reason of the trespass of the company, and in consequence of the road being operated on his land, according to the rule above stated.”

This clearly settles the question for this case, that the plaintiff is entitled to recover all the damages he has sustained by reason of the trespass of the company and in consequence of the road being operated on his land, and that the court or jury

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cannot take into consideration, for the purpose of lessening such damages, the fact that a part of the road was at the same time operated upon adjoining lands not owned by the plaintiff.

No new authorities have been cited upon this point on the present argument, and but one has been found by the court bearing directly upon the question. In the case of *Kucheman v. Railway Co.*, 46 Iowa, 366-377, two of the judges concur in holding to the doctrine contended for by the appellant in this case. Justice BECK dissented from this opinion of the two judges, and the other two judges held that the owner of land adjoining a street could not recover any damages on account of the location and use of a railroad along the street, whether the same was on the side of the street adjoining the plaintiff's land or not. The two learned judges who held that when the whole railroad is not located upon the plaintiff's land the damages must be apportioned, admit the difficulty of such apportionment. They say: "There is great difficulty in separating the damages for which a recovery is allowable from those for which it is not, yet such separation must be made. . . . We can lay down no rule for its ascertainment which we think would be of any practical benefit."

Justice BECK, in dissenting from this part of the opinion of his two associates, says: "The last part of the second point I cannot approve. It is too nice, too theoretical, for practical application. It raises an objection which does not, in fact, exist, and fails to give a satisfactory answer thereto. It imagines a disease, and provides no cure for it. The railroad cannot be built with one rail; the two are necessary to its construction. It is a unity composed of two rails, the ties, the ground it occupies, etc. Now this unity injures plaintiffs' property. The injury is not from the rail on plaintiffs' land, but from the entire road regarded as one thing. Plaintiffs may recover, in view of Mr. Justice ADAMS' opinion, because the road is partly on their land. The road, as a

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unity, injures plaintiffs' property. The rail on their land is not the cause of the injury. They ought to recover for all the injury sustained on account of the road. But the rule of the opinion prevents recovery for the full amount of damages they have sustained. It is in conflict with the fundamental rule which secures the recovery of damages which will fully compensate the injuries sustained."

The reasons of the dissenting justice harmonize with the reason given by this court upon the former appeal above quoted, and commend themselves to our judgment as the better reasons. The learned counsel for the appellants, seeing, perhaps, the difficulties which intervene in apportioning the damages according to the quantity of land taken from the plaintiff and that taken by the company from the adjoining owners, and considering that such rule had been discarded by this court in its former opinion, now attempt to reach a like result by insisting that the plaintiff shall not recover any damages which result from the mere proximity of the defendant's railroad to the plaintiff's lands, except so far as such damages are increased by the taking of plaintiff's land; and they have introduced evidence to show that the plaintiff's injuries would have been just as great if the railroad had been operated in the street, but entirely off of his lands, and the jury have so found the fact. Upon this theory of the case, if the railroad is located along the middle of a public street, none of the owners on either side would be entitled to recover beyond nominal damages for the actual occupation permanently of the lands in the street, as it is probable that a jury would in each case find, as they did in this, that the removal of the track a few feet one way or the other, in the middle part of the street, would not materially enhance or diminish the damages to the adjoining property.

The same result would follow where the line of the railroad was on the line between two adjoining owners, half the track on one and half on the other. In such case neither could

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recover beyond the value of the lands actually taken, as all other damages would generally result from what the counsel properly calls proximity of the railroad, and they would be the same, or nearly so, if the road were all upon one side of the dividing line. If the road were all on one side of the dividing line, the man upon whose land the road did not lie could not recover any damages because none of his land would be taken; and the man whose land was taken could recover only the value of the land actually taken, because his damages arising from the maintenance of the road would be nearly or quite the same had the road been located just off his land on the lands of the adjoining owner. None of the decisions of this court have recognized the distinction sought to be raised in this case. The statute provides that railroads may exercise the right of eminent domain upon certain conditions. They may take the lands of any citizen for the legitimate purposes of their corporations, upon making the just compensation provided for in the constitution, and this just compensation has been declared by the statutes to be "the value of the lands actually taken, and the damages sustained by the owner by reason of the taking thereof." See section 1848, R. S. 1878. And this court held in *Bigelow v. Railway Co.*, 27 Wis., 478; *Parks v. Railroad Co.*, 33 Wis., 413, and *Bohlman v. Railway Co.*, 40 Wis., 157, that nothing less than the allowance of such damages as are allowed by this statute would be a compliance with the requirement of the constitution that a "just compensation" shall be paid to the owner for his property taken for a public use. When, therefore, a railroad corporation takes the land of a citizen, it must comply with the conditions fixed by the constitution and the law; and if the constitution and the law requires that it shall pay the owner the value of the lands actually taken, and all other damages sustained by him by reason of such taking, then it must so pay or not take the land. The only question is, whether damages by reason of the proximity of the railroad

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are a part of the damages which the owner sustains by reason of the taking of his land for the purpose of operating a railroad thereon. We are not discussing the question as to whether a man whose property is not actually taken for the purposes of a railroad can recover damages by reason of the proximity of the road to his land. We may admit, for the purposes of this discussion and of this case, that he cannot. The fact that a man whose land is not taken cannot recover any consequential damages which he may sustain by reason of the building and operating the road near his land, does not prove that the party whose land is so taken cannot recover damages of a like nature. The right of the latter depends upon the constitution and the statute giving him the right to recover damages, and the right of the former depends upon the principles of the common law, the statute being entirely silent on the subject. If the "just compensation" spoken of in the constitution would not require the corporation taking the lands of the citizen for a public use to pay the consequential damages resulting from operating the railroad upon his land, still it would be entirely competent for the legislature to require the corporation to pay such damages as a condition of granting the right to take the property. The constitution clearly does not prevent the legislature from attaching other conditions beyond the payment of a just compensation to the right to take the property of the citizen for a public use, especially when such right is granted to a corporation which is not, in all its purposes, a mere public institution. It is, we think, settled in this state, that a person whose lands are actually taken for the uses of a railroad may recover the value of the lands taken, and for any other injury to his lands not taken, being a part of the tract used, together with that which is taken, and that no deduction can be made from such damage upon the pretext that his injury would have been just as great had the road been constructed in any other place, and just off his land. I suggest that it may be a sufficient reply to this

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claim, that the plaintiff would have been equally injured if the railroad had been built in another place, and just adjoining his lands, that there is no presumption that the railroad would have been built in any other place than where it was built, in the immediate vicinity of the lands injured. The court and jury have no right to guess that if the road had not been built on the plaintiff's land it would probably have been built very near it, and so he would have been equally injured, whether his lands were taken or not, except as to the mere value of the lands so taken.

It may be said that the law is unequal and unjust which allows the person whose lands are taken not only the value of his lands, but his damages resulting from the use of the lands so taken for railroad purposes, and makes no provision for making any compensation to the adjoining owner whose lands are not taken, but suffers in the same degree as his neighbor from the operation of the road. There may be some force in this argument when addressed to the legislature; but it can have but little force when addressed to the court, whose duty it is, not to make the laws, but to administer them as made.

The decisions of this court fully establish the rule, that the owner whose lands are taken for the use of a railroad is entitled to recover the actual value of the lands taken, and all other damages which he sustains by reason of the taking and use of his lands for the purposes of a railroad, and that, in fixing the amount of the same, the court or jury must estimate such damages as arise from and are directly attributable to, the construction, maintenance and operation of the road in the place where the same is located across his lands, without making any deduction based upon the guess that if the road had not been built across his land it would have been built near it, and consequently he would have been injured to nearly the same extent. *Railroad Co. v. Eble*, 3 Pin., 334; *Robbins v. Railroad Co.*, 6 Wis., 636; *id.*, 605; *Janesville v. Railroad*

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Co., 7 Wis., 484; *Ford v. Railway Co.*, 14 Wis., 609; *Pomerooy v. Railroad Co.*, 16 Wis., 640; *Snyder v. Railroad Co.*, 25 Wis., 60; *Thompson v. Railway Co.*, 27 Wis., 93; *Price v. Same*, id., 98; *Welch v. Railway Co.*, 27 Wis., 108; *Bigelow v. Railway Co.*, id., 478; *Hegar v. Railway Co.*, 26 Wis., 624; *Farrand v. Railway Co.*, 21 Wis., 435; *Parks v. Railroad Co.*, 33 Wis., 413; *Chapman v. Railroad Co.*, id., 629; *Sherman v. Railroad Co.*, 40 Wis., 645; *Bohlman v. Railway Co.*, id., 157; *Blesch v. Railway Co.*, 43 Wis., 183; and *Carl v. Railroad Co.*, 46 Wis., 625.

The rule of damages above discussed applies to proceedings to condemn and take lands for a railroad under the statute; and certainly an equally liberal rule should be adopted in estimating the damages to be recovered against a corporation which has taken and used the lands of the plaintiff as a mere trespasser. On the whole, we think, the charge of the learned circuit judge upon the question of damages was in accordance with the statute and the decisions of this court upon the subject, and that there was no error committed by him in that part of his charge.

If the judge erred in charging the jury that it was immaterial, as affecting the plaintiff's right to recover, whether any part of the defendant's track was upon his land or not, such error could not affect the judgment in this case, as the special verdict finds that the road was in part located and operated upon his lands.

We have examined the exceptions taken to the admission of evidence, and do not think the judge erred in this respect. Upon the whole record we are satisfied that the case was fairly tried upon its merits up to the point when the same was submitted to the jury; and we regret that we are compelled to reverse this judgment on account of irregularities which occurred in procuring the final verdict of the jury. This case presents a gross perversion of the statutory right of a party to a special instead of a general verdict. In this case there were

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but two litigated questions: *First*, Was the defendant's railroad, or any part of it, located and operated upon the plaintiff's land? and *second*, If it was so located upon his land, what damages had he suffered in consequence of such location and operation? Yet upon this question of damages, which was in its nature indivisible, and any attempt to analyze the same and fix the amount which should be charged for each element which went to make up the whole damage would at best be an uncertain guess, the jury were required by the plaintiff to answer five questions, by the defendant seven, and by the court one. The third question put by the court and the fifth one put by the plaintiff covered the whole question of damages. All the others, by both the plaintiff and defendant, were questions strictly in the nature of an examination of the jury to ascertain what elements of damage they considered in making up the gross damage, and requiring them to fix a definite sum allowed by them for each of those elements. This examination of the jury tended only to confuse and embarrass, without in any manner aiding them or the court in arriving at a true verdict. The result of the process in this case is a clear demonstration of the perniciousness of the practice.

When the jury returned into court the first time, they submitted a verdict, and had attempted to answer, and did in fact answer, all the questions submitted; but the cross examination had effected the confusion it necessarily tended to, and the answers were apparently contradictory. In attempting to analyze the damage into its various elements, and affix a sum to each element, and also to fix the amount of the damages in gross, the gross damages found did not agree with the total of the sums fixed to the several elements of damage. The verdict as first returned showed that the several sums given in answer to the questions calling for the amount of damage they found resulting from particular causes, amounted to the sum of \$2,165.35; and in answer to question 5, as to what the gross damage was, they say \$3,090, composed of the items which,

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according to their previous answers, amounted to the said sum of \$2,165.85, and the item fixed to the third question proposed by the court. The answer to such third question was as follows:

Answer. \$5,100, less \$2,010 in questions 2, 3 and 4—\$3,090.

Questions 2, 3 and 4, above referred to, were probably intended for 1, 3 and 4, mentioned in the answer to the 5th question of the plaintiff. These answers staggered the presiding judge, and, as it seemed to him impossible to determine what the jury meant to find as the plaintiff's gross damages, he further instructed the jury, and sent them out again to explain their verdict. They came in the second time with the same answers as at first, except that the answer to plaintiff's fifth question, instead of being \$3,090, was now \$3,251.96; and the answer to the third question propounded by the court was changed by striking out all the first answer, and inserting in its stead \$1,086.11. This answer was more inexplicable than the first, as the answer to the court's third question called for the same amount of gross damages as the answer to the plaintiff's fifth. The judge then further instructed the jury, and prepared three more questions for them to answer; and the jury retired for the third time, and then returned their answers as follows: The answers to the first, second and third questions of the plaintiff were the same as they returned the first and second times. The answer to the fourth question of the plaintiff was changed from the sum \$271.52, as answered the first and second times, to the sum of \$1,357.62. The answer to the fifth question of plaintiff was the same as returned the second time, viz.: \$3,251.96, and the answer to the third question of the court was now made \$3,251.96, the same as the answer to the fifth question by the plaintiff. All the other questions were answered as at first, except the additional questions propounded after the jury had returned into court the second time. The verdict had now become consistent with itself, and the jury were discharged.

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We think it would be a dangerous precedent to permit a verdict obtained in this manner to stand. It will be seen that the jury at first returned, in answer to the third question of the plaintiff, that they estimated the damages by reason of the injury to the plaintiff's premises as a residence for himself and family, at the sum of \$25 per year, or a total of \$272.52; and that, on their returning their verdict for the third time, they estimate this same item of damages at \$125 per year, or a total of \$1,357.62; that they first returned their verdict for the total damages in answer to the plaintiff's fifth and the court's third question at the sum of \$3,090; and that by their second verdict they fix this total damage, in answer to plaintiff's question, at \$3,251.96, and in answer to the court's question on the same subject at \$1,086.11, and by their third verdict, to both questions, at \$3,251.96.

The power of the court to refer the verdict of a jury back to them for further consideration must have some limits; and the exercise of this power has always been looked upon with disfavor, except in those cases where it is exercised for the purpose of allowing the jury to perfect a verdict which is imperfect by reason of their omission to make some necessary computation of interest, or the amount due upon some instrument upon which they have found a party entitled to recover. But when the jury have found upon all the issues submitted to them, it would seem improper for the court to recommit the matter to them again for the reason*that in the estimation of the court there is some inconsistency in the same. If there should be an inconsistency so glaring that it was evident the jury had made a mistake, it might be permissible for the court to call the attention of the jury to such mistake, and permit them to retire and correct the same, if they desired to do so. But we do not think it permissible to allow a jury, under pretense of correcting a mistake in their verdict, to render a verdict essentially different from that which was first rendered. A jury, having once fixed the amount of damages they find the

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plaintiff entitled to recover, ought not to be permitted to change such amount to the prejudice of either party, unless it clearly appears that the amount first inserted in the verdict was not the amount intended by the jury to be given, and the sum so inserted had been placed there by mistake, contrary to their intention. In this case the jury changed both the amount of damages in gross and the damages arising from a particular cause, after their first verdict was returned to the court, without giving any apparent reason for so doing, except, perhaps, that it was done in order to make the verdict consistent with itself. We are not satisfied with the verdict of a jury which, after mature deliberation, deliberately finds that the plaintiff is entitled to recover the sum of \$3,090, and then, upon the matter being again submitted to them, finds he is entitled to recover the sum of \$3,251.96, without rendering any excuse for the addition; nor with a verdict that first finds that plaintiff's damages to his premises as a dwelling-house is twenty-five dollars per year, and then, upon reconsideration, finds the same damages to be \$125 per year, giving no reason for the change of opinion except that such last finding will make it consistent with the final general verdict as to damages.

Proffatt, in his work on Jury Trial, § 457, says: "When the jury return a general verdict settling the rights of the parties, and upon which judgment can be entered, or when they return a special verdict finding the facts of the case, and leaving the questions of law arising upon those facts to the court, it would be improper for the court to send them out again for further consideration." Whittaker, in his Practice, vol. 2, 395, says: "If the verdict be returned in open court, and in the presence of counsel, and the jury, as is often the case, have fallen into manifest error, the present is the proper period for correction. By a reconsideration of such errors, under the direction of the judge, much subsequent trouble, and possibly the necessity of a new trial, may be obviated. This observation, of course, as-

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sumes that the errors in question have arisen from a manifest misapprehension, on the part of the jury, as to the extent of their functions or as to the real nature of the question submitted to them; and it cannot be changed in substance, however erroneous it may be." See also *Trust Co. v. Harris*, 2 Bosw., 75, and *Sutliff v. Gilbert*, 8 Ohio, 405.

The appellant having objected to committing the case the second and third times to the jury, and in view of the fact that the final verdict as rendered by the jury was substantially different in its material parts from that first rendered, we are of the opinion that the judgment must be reversed, and a new trial granted.

Before closing this opinion, we are constrained to again remark that the necessity for a new trial in this case grows out of the fact that the question as to the amount of damages which the plaintiff was entitled to recover was unnecessarily and improperly embarrassed by requiring the jury to answer a large number of questions relating to circumstances which they might be supposed to consider in arriving at the amount of damages which the plaintiff ought to recover. Under the circumstances, the jury were less to blame for being unable to give a consistent and wholly satisfactory verdict, than the parties for demanding that they should give an analysis of the elements of damage which made up the gross damage, and fix a certain sum as the amount allowed for each such element. The right to demand a special verdict of a jury is in many cases a valuable one; and when this right is properly limited to the ascertainment of such facts, and such alone, as are material to the rights of the parties, it cannot but aid in the attainment of just verdicts. The statute upon this subject, section 2858, R. S. 1878, directs that when a special verdict is demanded, "such verdict shall be prepared by the court in the form of questions in writing, *relating only to material issues of fact, and admitting a direct answer, to which the jury shall make answer in writing.*" We suggest that the learned

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circuit judges, in taking special verdicts, should adhere to the directions of this statute, and, while they avail themselves of the reasonable suggestions of learned counsel for the respective parties as to what questions should be submitted, submit only such as relate to the material issues, and rigorously exclude all questions which have no other object than to obtain from the jury the reasons which actuate them in finding such material facts. In this case, the one question put to the jury by the court upon the subject of damages covered completely the issue in the case upon that point, and, in our estimation, should have been the only question submitted to them upon that issue; and all the other questions upon that subject, put by the plaintiff and defendant, might with great propriety have been excluded by the court as immaterial and impertinent. It is now evident that if such course had been taken by the learned judge, it would have saved both parties the expenses of a new trial in the action. The learned circuit judge had, in his instructions to the jury, very clearly pointed out what facts and circumstances they might consider as going to the question of damages, and what they should not consider in estimating them. It is to be presumed that the jury gave proper attention to these instructions of the court; and neither party to the action had an absolute right to compel them to answer questions propounded for the mere purpose of ascertaining whether they in fact followed the instructions given.

We have been constrained to make these strictures upon the manner of taking the special verdict in this case, not so much for the reason that it is more objectionable than many others which have come under the consideration of this court, but because the vicious practice in this case has been highly prejudicial to the interests of the parties litigant, and furnishes a favorable opportunity to urge upon the bench and bar the necessity of a greatly needed reformation of the practice in this particular.

 Levy vs. Martin, imp.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied on the 3d of February, 1880.

 LEVY vs. MARTIN, imp.

October 14, 1879 — January 7, 1880.

(1) *Change of venue.* (2) *Subrogation.*

1. An application to change the place of trial of a foreclosure suit, for prejudice of the judge, *held* to have been properly denied, where made in behalf of one only of several defendants.
2. At the request of executors, plaintiff advanced moneys to pay a mortgage of lands of the estate, held by M. and past due, and also to pay accrued taxes on the lands; and he took as security for such advances a mortgage of the same lands made by the executors in pursuance of a license of the county court, which was, however, invalid. When his first mortgage was thus paid, M. owned subsequent mortgages of the same lands, executed by the testator's widow while she had a dower interest therein; and he refused to assign the first mortgage to plaintiff, and discharged it of record. *Held*, that plaintiff, as security for his advances, is entitled to be subrogated to M.'s rights as mortgagee under such first mortgage; and this not only against the heirs, but also as against M.'s subsequent mortgages.

APPEAL from the Circuit Court for *Milwaukee* County.

I. In October, 1869, Charles Eul and his wife, Mary Ann Eul, executed a mortgage of land to *Matthew Martin*, to secure a note of even date given by said Charles to *Martin*, for \$600, payable in three years, with interest at ten per cent. The mortgage contained a provision for paying a solicitor's fee of \$50 in case of a foreclosure; and it was immediately recorded. Charles Eul was the owner in fee of the mortgaged premises from the date of the mortgage until his death, November 30, 1870. He left surviving him his said wife, and several infant children; and by his will (duly admitted to probate) the

48	198
75	198
48	198
84	7
48	198
90	521

48	198
117	2414

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mortgaged land was devised in equal undivided parts to his children, subject to the life estate of his widow; and he left no other property. At the time of his death he was indebted to *Martin* in the full sum secured by the mortgage.

II. In April, 1873, said Mary Ann Eul, widow of Charles Eul, having intermarried with one Richter, she and Richter mortgaged the same real estate to *Martin* to secure a loan to them of \$400; and in April, 1874, they executed another like mortgage of the same property to *Martin* for another loan of the same amount. In his answer herein *Martin* alleges that these sums were borrowed and used for the purpose of making necessary and permanent improvements and repairs on the premises, with the assent and approval of the executors and of all persons interested in the estate; but the court found that the moneys were not so used.

III. In December, 1876, the executors of the will presented a petition to the county court, stating that the principal sum secured by the \$600 *Martin* mortgage, with interest from April 1, 1876, was due and unpaid, and that *Martin* was pressing the payment, and was about to commence foreclosure; and praying for license to make a new loan, secured by mortgage of the same land, of a sum sufficient to pay the amount due on said \$600 *Martin* mortgage, together with the taxes theretofore assessed against said premises, and the expenses of administration. In January, 1877, the county court made an order directing the executors to mortgage the land to secure a loan not exceeding \$800, with interest at ten per cent., for the purposes above named. On the 31st of the same month, the executors applied to the plaintiff, *Levy*, for a loan of \$800, stating that they were duly authorized to borrow that sum and to execute a mortgage therefor which would be a first lien on said real estate, and agreeing with him that if he would loan the money they would, in addition to giving him such new mortgage, procure and deliver to him said \$600 *Martin* mortgage, with an assignment by *Martin*. For the purposes

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and upon the representations above stated, plaintiff lent them \$800, which was applied for said purposes; and the executors in both their representative and individual characters, executed to him a note for the amount, payable in two years, with interest at ten per cent., secured by mortgage on said real estate, with a clause for the payment of \$75 as solicitor's fee in case of a foreclosure; and this mortgage was duly recorded. The execution of such mortgage was reported to the county court by the executors, and an order of confirmation there made. All the proceedings in the county court were regular, except that no guardian was appointed to represent the infants therein. The executors did not procure an assignment to plaintiff of the *Martin* \$600 note and mortgage, but delivered to him the note and mortgage with a release thereof, which was recorded. No payment has been made on the executors' mortgage except the interest for one year. The executors, in their individual character, are insolvent.

This action was brought to foreclose the \$800 mortgage given by the executors; and the plaintiff, after alleging the facts set forth in paragraphs I and III, *supra*, further prays that the money advanced by him may be declared a lien upon the real estate in question; that he may be subrogated to all the rights of *Martin* under said \$600 mortgage; that the satisfaction of said mortgage may be cancelled, and the mortgage declared a continuing lien upon the premises; that all the defendants may be barred and foreclosed, etc.; that the premises may be sold, unless redeemed as provided by law, to make the amount of plaintiff's said advances, with interest, costs and \$75 solicitor's fees, etc.

The executors did not answer. *Martin* answered, setting up the facts stated in paragraph II, *supra*. His answer also denies that the executors ever promised to obtain from him an assignment to plaintiff of the \$600 note and mortgage, or that plaintiff, in making his loan to them, relied upon any such promise or understanding, and avers that the money ob-

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tained from plaintiff was paid to him (*Martin*) for the sole purpose of satisfying and extinguishing said \$600 note and mortgage, as was well understood by the plaintiff, and that plaintiff never claimed that those securities should have been assigned to him until after the commencement of this action.

The infant children of the testator, Charles Eul, appeared by guardian *ad litem*, and answered, setting up the want of notice to them of the application of the executors for a license to give the \$800 mortgage, and also claiming that plaintiff ought not to be subrogated to the former rights of *Martin* under the \$600 mortgage, because the payment of that sum by him was voluntary.

When the cause was at issue, *Martin* moved for a change in the place of trial for prejudice of the circuit judge; but the motion was denied.

The facts found by the court are stated substantially in paragraphs I to III, *supra*. Upon those facts the court held that the plaintiff was entitled to a judgment, against all the defendants, of foreclosure and sale of the real estate in question, to make the amount of his \$800 mortgage, with interest and costs, and \$50 as solicitor's fee. From a judgment in pursuance of this determination, *Martin* appealed.

For the appellant, there was a brief by *Markhams & Smith*, and oral argument by *E. P. Smith*. Among other things, they contended, 1. That the defendant *Martin*, upon filing his affidavit, had an unconditional right to a change of venue; the objections taken in *Wolcott v. Wolcott*, 32 Wis., 63, and *Taylor v. Lucas*, 43 id., 158, having no application to a case in equity against a party in default, or one answering severally, or one having a common interest but appearing by a separate attorney. R. S., § 2525; 1 Van Santv. Eq. Pr., 258, and cases cited; Vorhees' Code, 9th ed., 147; *Brittan v. Peabody*, 4 Hill, 62, note; *Job v. Butterfield*, 5 Exch., 827. 2. That the circuit court had, upon the case made, no jurisdiction in equity to grant the relief sought. It did not appear but that

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the statutory remedy was ample, by application to the probate court for leave to mortgage or to sell the equity of redemption. R. S., § 3878; *Batchelder v. Batchelder*, 20 Wis., 452; *Brown's Appeal*, 66 Pa. St., 155; *Bresee v. Stiles*, 22 Wis., 120; *O'Dell v. Rogers*, 44 id., 173. 3. That there was no ground for declaring an equitable lien, or for the application of the doctrine of subrogation. In general, one creditor has no priority over another on the ground that he advanced the money out of which the debtor's property was made. *Morton v. Naylor*, 1 Hill, 583; *Hoyt v. Story*, 3 Barb., 262; *Burn v. Carvalho*, 4 Mylne & C., 690; *Watson v. Wellington*, 1 Russ. & M., 602; *Miller v. Price*, 20 Wis., 117. The case was that of an ordinary loan to pay a debt, except that it was necessarily made under a judicial license; but the lender, as in other cases, had it in his power to assure himself that the security was ample. He cannot now claim to be subrogated to the rights of the creditor. *Downer v. Miller*, 15 Wis., 627; *Miller v. Price*, 20 id., 117; *Pelton v. Knapp*, 21 id., 63; *Watson v. Wilcox*, 39 id., 643; *Sanford v. McLean*, 3 Paige, 117; *Banta v. Garmo*, 1 Sandf. Ch., 383. Nor could the executors, by paying taxes, create a lien in favor of the person who loaned the money so used, superior to all other private liens. *Horton v. Ingersoll*, 13 Mich., 409; *Wilcox v. Bates*, 45 Wis., 145; 2 Washb. R. P., 229, 230. But whatever might be thought of the question of equitable lien were there no intervening rights, it is clear that where such rights exist, the lien cannot be declared except as subject to them. *Pelton v. Knapp*, 21 Wis., 69; *Patterson v. Pope*, 5 Dana, 241; *Jenkins v. Continental Ins. Co.*, 12 How. Pr., 68; Jones on Mort., § 1081. The relief sought would compel the appellant, against his will, to transfer to a third party a mortgage wholly paid for with his own funds, and held as a protection to his subsequent liens, and thereby render it incumbent upon him to redeem from the same security, no matter at what disadvantage or cost. He may well decline to again assume the

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relation of creditor to the mortgagor under such circumstances. There might be some reason in plaintiff's demand had he been obliged to pay this mortgage in order to protect other interests; but he was a mere volunteer. It is not claimed that he would have the right of subrogation were the executor's mortgage valid; then why when it is invalid? The mortgage sought to be revived was paid, intentionally and absolutely. It would seem that by such payment it had become effectually blotted out. Story's Eq. Jur., §§ 499, note 1, and 1227; *Guy v. Du Uprey*, 16 Cal., 195; *Palmer v. Yager*, 20 Wis., 91.

For the respondent, there was a brief by *Leander Wyman*, with *Frank B. Van Valkenburgh*, of counsel, and oral argument by *Mr. Van Valkenburgh*. As to the propriety of the order denying a change of venue, they cited *Wolcott v. Wolcott*, 32 Wis., 63; *Rupp v. Swineford*, 40 Wis., 28. They further argued that the money advanced by plaintiff was all expended to discharge liens confessedly prior to appellant's two mortgages; that the latter covered, at best, only the dower interest of the testator's widow, which was subject to the payment of the debts of the deceased, taxes and expenses of administration; that to continue the priority of the liens in favor of the plaintiff placed appellant in no worse position than he would have occupied had the money not been loaned to the executors, while to do otherwise would be giving him an unjust, illegal and inequitable preference; and that as plaintiff had advanced his money in good faith, in pursuance of proceedings had in the proper court, and in the belief that he was securing a valid mortgage upon the premises in controversy, it could not be said, in any reasonable or just sense, that he was a mere volunteer. *Blodgett v. Hitt*, 29 Wis., 185, and cases there cited; *Winslow v. Crowell*, 32 id., 662; *Mohr v. Tulip*, 40 id., 66, and 44 id., 274.

COLE, J. The application for a change of the place of trial was founded on the affidavit and made in behalf of the defend-

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ant *Martin*, alone. It was therefore properly denied, under the decisions of this court in *Wolcott v. Wolcott*, 32 Wis., 63; *Rupp v. Swineford*, 40 Wis., 28; *State ex rel. Cuppel v. The Chamber of Commerce*, 47 Wis., 670. The learned counsel for *Martin* attempted to distinguish this case from the above; but we think it comes fully within the principle of those decisions.

The really important question in the case is, whether the plaintiff, upon the undisputed facts, is equitably entitled to a prior lien to the extent he would have if, as assignee, he were foreclosing the \$600 *Martin* mortgage. It is insisted by his counsel that the circumstances under which he advanced his money to pay that mortgage justly entitle him to such priority in this action, and that he should be treated as succeeding to the rights of *Martin* under that mortgage. This right, it is said, is founded upon the principles of subrogation which this court has recognized and enforced in other strictly analogous cases. *Morgan v. Hammett*, 23 Wis., 30-40; *Blodgett v. Hitt*, 29 Wis., 169; *Winslow v. Crowell*, 32 Wis., 642-662; *Mohr v. Tulip*, 40 Wis., 66.

If this position is sustainable in law, it will, of course, be immaterial to inquire as to what interest or estate was encumbered by the two mortgages given *Martin* by Mrs. Richter and husband, April 30, 1873, and April 22, 1874. It is assumed, for the purposes of the case, that *Martin* acquired some interest or lien under these mortgages upon the premises sought to be sold in this foreclosure suit. It was admitted on the trial, by the plaintiff, that Mrs. Eul (who afterwards married Henry Richter) had her dower interest in the land described in the mortgages, at the time of her husband's death, and that such interest continued. This admission cannot properly be disregarded, and will not be.

It is not claimed that this right of subrogation, or to a prior lien, depends upon any express agreement made with *Martin* that his mortgage should be assigned or kept alive for plaintiff.

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iff's benefit. It is a fair inference, however, from the evidence, that the plaintiff's agents, when they loaned the money to the executors to take up that mortgage, expected it would be assigned and not paid, and that this was one inducement for making the loan. Mrs. Richter testified that she told Becher and Milbrath, when she applied for the loan, that she would get an assignment from *Martin*, but when she asked him to assign it he refused, unless his other mortgages were paid. In this aspect, the case comes very nearly within the ruling in *Downer v. Miller*, 15 Wis., 612, where there was an agreement between Miller and Steever that the former was to indorse a note for the latter to raise money at the bank, to be used to procure an assignment of a foreclosure judgment to Miller, in order to indemnify him as indorser. The money was in fact used to pay and extinguish the judgment of foreclosure. This was held to be a fraud upon Miller, and he was permitted to enforce the judgment and collect the amount that he had paid.

But, independently of any agreement upon the subject, it is insisted that the plaintiff has an equitable right to have his mortgage declared a prior lien; and we think this claim must be sustained to the extent of the amount due on the \$600 mortgage, and the taxes paid out of the money advanced to the executors by the plaintiff. The grounds for that relief rest upon principles of natural justice and equity, which are amply vindicated in the decisions above cited, especially in the exhaustive opinion of Mr. Justice LYON in *Blodgett v. Hitt*. The plaintiff loaned his money to the executors to pay off the \$600 mortgage and taxes, which were incumbrances upon the property, and confessedly liens prior in right and superior in equity to any lien that *Martin* acquired under his mortgages of 1873-4. This \$600 mortgage was given by the testator and wife to *Martin* in 1869, was past due, and *Martin* wanted his money. The plaintiff loaned his money at the solicitation of the executors, to take it up and relieve the estate. It is true,

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the plaintiff took from the executors at the time the \$800 mortgage in suit, relying upon the validity of the license of the probate court of Racine county authorizing and directing the executors to execute that mortgage for the purpose of procuring this loan. But it is conceded that this license is defective and does not bind the heirs; consequently the security upon which the plaintiff relied has practically failed. Still his money has been applied to the discharge of just debts against the estate, and he has the prior right to be reimbursed out of the estate to the extent of the incumbrances which he has removed.

It is objected that in furnishing the money to discharge these incumbrances he was a mere volunteer, in whose behalf there can be no subrogation. But the plaintiff loaned his money at the request of the executors, relying upon the validity of the mortgage which they had been ordered by the probate court to execute, and is not to be treated as a volunteer in the legal sense of that term. The case of *Blodgett v. Hitt* is decisive upon that point. See also *Payne v. Hathaway*, 3 Vt., 212. This case is distinguishable in its facts from *Watson v. Wilcox*, 39 Wis., 643. There the plaintiff was treated simply as a volunteer, advancing his money to pay a debt merely as an investment. Here the plaintiff advanced his money at the request of the executors, relying upon the validity of a judicial proceeding, and to discharge incumbrances upon the estate. It is not just to say that in this he was governed solely by a spirit of speculation, without regard to the advantage or interest of the heirs. Certainly it does not lie in the mouth of the heirs to say, under the circumstances, that the plaintiff was a volunteer, and is not entitled to be reimbursed out of the estate to the extent of the incumbrances removed. Nor has *Martin* any ground to complain because the plaintiff is substituted to his rights under the \$600 mortgage. It is insisted by his counsel that he has some intervening right which will be prejudiced or defeated if this subroga-

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tion takes place. But what intervening right has he? The \$600 mortgage existed on the estate when he took the two mortgages given in 1873 and 1874; indeed, he held that mortgage. He is, therefore, in no position to say that he is injured by allowing the plaintiff a prior lien to the amount of that mortgage and the taxes actually paid out of his money.

Martin does not stand in the position that Knapp occupied in *Pelton v. Knapp*, 21 Wis., 64. There the attempt was to revive a mortgage as to previous payments made, so as to take precedence of a judgment already attached in Knapp's favor. The court held that while, perhaps, as between the immediate parties, mortgagor and mortgagees, it might be competent to revive the mortgage in favor of the party making the payments, yet this could not be done so as to displace the intervening interest of a third party. But the doctrine of that case does not seem to have any direct bearing on the one at bar, because here there is no intervening interest. If the plaintiff is subrogated to *Martin's* rights under the \$600 mortgage, *Martin* has precisely the same security he had before this mortgage was paid: no more, no less. So far as the mortgages given by Mrs. Richter and husband are concerned, such priority would leave him just where he stood when they were executed. We have stated that Mrs. Eul (Richter) had joined with her husband in executing the \$600 mortgage in 1869. She only had a dower interest in the surplus remaining after the payment of that mortgage. Section 5, ch. 89, Tay. Stats. We assume that Mrs. Richter mortgaged this dower interest to *Martin* by the mortgages given in 1873 and 1874. This is certainly all the estate she had in the property to mortgage at that time; and what hardship can it be to place *Martin* in the same position he occupied when the \$600 mortgage was paid? He has really the same rights and the same security for the payment of those mortgages that he had then. What ground has he then to complain of the subrogation of the plaintiff to his rights under that mortgage? Such

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subrogation will leave him precisely where he was when the plaintiff advanced his money to the executors. Of course, the plaintiff's prior lien must be limited to the amount which would be collectible on a foreclosure of this mortgage, and this would include taxes actually paid out of his funds, but not the expenses of administration nor any other charge which could not properly be recovered in the foreclosure of that mortgage.

The bill of costs as taxed in this case seems excessive and incorrect. It must be corrected, and all erroneous items stricken out, when judgment is again entered. It is not necessary for us to stop and point out these erroneous charges at this time.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to that court for the entry of the proper judgment according to this opinion.

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December 17, 1879—January 7, 1880.

Foreclosure of mortgage: Appointment of a receiver.

1. Although, by the laws of this state, the mortgagor of land holds the legal title until the foreclosure sale, yet in a proper case, when necessary to protect the mortgagee's interests, equity will appoint a receiver; this may be done by order in the foreclosure suit, after judgment; and the fact that the complaint does not state facts authorizing the appointment, is no objection in such a case.
2. Where the whole amount of the mortgage debt was not due, and the premises were ample security for the amount due, with costs, but the land could not advantageously be sold in parcels, and the whole mortgage debt would become due before there could be a sale under the judgment: *Held*, that the case should be treated as if the whole debt were due.
3. The mortgage included the homestead; neither the interest nor any part of the principal had been paid; the debt was larger than the sum for

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which the premises could probably be sold; and there were other unsatisfied judgments against the mortgagor. *Held*, that, in the absence of rebutting proofs, the insolvency of the mortgagor was sufficiently established.

4. Where the foregoing facts were shown, with the further fact that the mortgagor was willfully neglecting to pay the taxes on the land, there was no abuse of discretion in appointing a receiver.
5. Whether the homestead should not have been excepted from the order, not here considered.

APPEAL from the Circuit Court for *Winnebago* County.

Foreclosure of a mortgage of a quarter section of farming land, executed by *Patrick Carey* and wife to secure payment of \$4,300, with interest payable semi-annually. When the judgment was rendered, March 15, 1879, there was due interest amounting to \$594; but the principal was not to become due until April 1, 1880. There was no appearance before judgment, on the part of any defendant. On the 29th of April, 1879, the court, on plaintiff's motion, appointed a "receiver of the rents, profits and crops" of the mortgaged premises, "excepting the house thereon and garden attached, occupied by defendant, with way between the same and highway, pending the sale of the same in this action." The affidavits filed in support of the motion showed that the taxes on the premises for 1877 and 1878, amounting to \$46.40, remained unpaid; that the premises were advertised for sale for the taxes of 1878, and had been sold to the county in the spring of 1878, for the taxes of 1877, and the certificates of sale transferred to strangers; and they tended to show that the value of the premises did not exceed \$4,000 or \$4,500. The counter affidavit of *Patrick Carey* tended to show that said premises were worth not less than \$6,000; and in this affidavit he "claims a right of homestead in the premises."

From the order appointing a receiver, the defendant *Patrick Carey* appealed.

Chas. W. Felker, for appellant:

A receiver will not be appointed when no part of the principal is in arrears.

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cipal is due. *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38; Edwards on Receivers, 60. A sale of part being sufficient to pay the interest due, the entire property should not be placed in the hands of a receiver. *Quincy v. Cheeseman*, 4 Sandf. Ch., 406. In no case will a receiver be appointed, certainly not where the mortgage does not expressly give a lien on rents and profits, unless it clearly appears, both that the security is inadequate, and that the mortgagor is insolvent. *Sea Insurance Co. v. Stebbins*, 8 Paige, 565; *Brown v. Chase*, Walker's Ch., 43; *Myers v. Estell*, 48 Miss., 372; *Shotwell v. Smith*, 3 Edw., 588; *Haas v. Chicago Building Society*, 8 Cent. L. J., 456; Jones on Mort., §§ 15, 16. And the bill should allege inadequacy of the security. *Warner v. Gouverneur's Ex'rs*, 1 Barb., 36; Edwards on Receivers, 36.

The doctrine of appointing receivers in mortgage cases had its foundation in the rule, that the mortgagee was the legal owner of the land; and as that rule no longer obtains, and the mortgagor now has one year's redemption expressly given by statute, it seems questionable whether equity has power to appoint a receiver as between mortgagor and mortgagee. *Guy v. Ide*, 6 Cal., 99.

Moses Hooper, for respondent:

1. A receiver may be appointed after judgment. R. S., § 2787; *Haas v. Chicago B. S.*, 8 Cent. L. J., 456; High on Receivers, § 110; *Hyman v. Kelly*, 1 Nev., 179; *Astor v. Turner*, 11 Paige, 436; *Bowman v. Bell*, 14 Simons, 392. 2. A mortgage of the fee includes the rents and profits; and loss of interest will be guarded against as carefully as loss of principal. But in this case the whole should be treated as due, because maturing before sale. 4 Sandf. Ch., 406. 3. An express allegation of insolvency was unnecessary, the facts which were alleged, such as failure to pay interest on a mortgage of the homestead, or to keep up the taxes on such homestead, making a *prima facie* case. *Brown v. Montgomery*, 20 N. Y., 287, 291; 8 Cent. L. J., 456; 1 Nev., 179; *Orphan*

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Asylum v. McCartee, Hopk., 435; *Mahon v. Crothers*, 28 N. J. Eq., 567; *Pullan v. Cinn., etc., Railroad Co.*, 4 Biss., 35; *Cheever v. Railroad Co.*, 39 Vt., 653, 663-4; *Hoffman's Prov. Rem.*, 477. 4. The appointment of a receiver is for the preservation of the estate, and is discretionary. *Crane v. McCoy*, 1 Bond, 422; *Mil., etc., R. R. Co. v. Soutter*, 2 Wall., 510, 521; *Verplank v. Caines*, 1 Johns. Ch., 57, 58; *Lottimer v. Lord*, 4 E. D. Smith, 183; *State v. Railway Co.*, 18 Md., 193; *Cortleyeu v. Hathaway*, 11 N. J. Eq., 39; *Williamson v. R. R. Co.*, 1 Biss., 209; *Cairns v. Chabert*, 3 Edw., 312; *Payne v. Atterbury*, Har. Ch. (Mich.), 414; *Tanfield v. Irvine*, 2 Russ., 149; *Wall St. Fire Ins. Co. v. Loud*, 20 How. Pr., 95; *Johnson v. Tucker*, 2 Tenn. Ch., 398; *Reade v. Hamlin*, Phill. Eq. (N. C.), 128; *Stockman v. Wallis*, 30 N. J. Eq., 449; *Chetwood v. Coffin*, id., 450. 5. The appointment of a receiver of mortgaged premises is not prohibited by implication by the statute giving one year for redemption. *Finch v. Houghton*, 19 Wis., 149; *Astor v. Turner*, 2 Barb., 444; and cases previously cited.

TAYLOR, J. This is an appeal from an order appointing a receiver in an action to foreclose a mortgage. The order was made after judgment. The appellant is the mortgagor. The most material question raised upon this appeal is, whether the circuit court has power, in an action to foreclose a mortgage upon real estate, to appoint a receiver of the rents and profits thereof in any case, either before or after judgment.

It is urged by the learned counsel for the appellant, that as, by the laws of this state, a mortgagor has a legal right to the possession of the mortgaged property until after foreclosure and sale of the mortgaged premises, notwithstanding the condition of the mortgage has not been performed, as all legal actions for the recovery of the possession of the mortgaged premises have been taken from the mortgagor by express statute, and because the courts have held that the

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legal title in fee remains in the mortgagor until after foreclosure and sale, a court of equity has no power to deprive the mortgagor of his right to the possession under his title, until such title is extinguished by a sale upon the judgment of foreclosure.

This question has been frequently passed upon by the courts of other states where the law gives a mortgagee no greater rights than are secured to him by the laws of this state; and, after a careful examination of decisions made by such courts, it will be seen that the general current of authority is in favor of the exercise of the power in a proper case, notwithstanding the laws prohibiting the mortgagee from taking any proceeding at law to recover the mortgaged premises until after sale. The power of a court of equity to appoint a receiver of the rents and profits of the real estate mortgaged, in an action to foreclose the mortgage, in states where the rights of the mortgagor are substantially the same as in this state, has been sustained by the courts in the following cases: *Bank v. Arnold*, 5 Paige, 39; *Ins. Co. v. Stebbins*, 8 Paige, 566; *Astor v. Turner*, 11 Paige, 436; *Verplank v. Caines*, 1 Johns. Ch., 58; *Clason v. Corley*, 5 Sandf. S. C., 447; *Bank v. Tallman*, 31 Barb., 201; *Smith v. Tiffany*, 13 Hun, 671 (N. Y.); *Callanan v. Shaw*, 19 Iowa, 183; *Fitzgerald v. Daniels*, Chicago Legal News, Jan. 3, 1880, p. 141; *Pasco v. Gamble*, 15 Florida, 562; *Hyman v. Kelly*, 1 Nevada, 179; *Phillips v. Eiland*, 52 Miss., 721; *Whitehead v. Wooten*, 43 Miss., 526; *Myers v. Estell*, 48 Miss., 372; *Boyce v. Boyce*, 6 Rich. Eq. (S. C.), 302, and *Matthews v. Preston*, cited in a note to the last case; *Douglass v. Cline*, 12 Bush (Ky.), 608-622; *Bridge Co. v. Douglass*, 12 Bush, 673.

Many other cases might be cited, but the foregoing are sufficient to show the general current of opinion in this country upon this subject. In England, and those states in this country where the legal title to the real estate vests in the mortgagee, and after forfeiture he can maintain an action of

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jectment to recover the possession of the mortgaged premises, or compel the tenants to attorn to him, as a general rule a court of equity will not appoint a receiver on the application of the mortgagee, but leave him to his legal remedies. *Sturch v. Young*, 5 Beavan, 557; *Anderson v. Kemshead*, 16 Beavan, 329; *Berney v. Sewell*, 1 Jac. & Walker, 647; *Ackland v. Gravener*, 31 Beavan, 482; *Cortleyeu v. Hathaway*, 11 N. J. Eq., 39; *Frisbie v. Bateman*, 24 N. J. Eq., 28; *Best v. Schermier*, 2 Halst. Eq. (N. J.), 154.

The rule in England has been changed by statute so that a mortgagee may have a receiver whenever the principal, or an installment of interest or principal, or insurance agreed to be paid by the mortgagor, remains unpaid for a definite period after the same becomes due (23 and 24 Vict., c. 145, §§ 11-32), without regard to the adequacy of the surety. Previous to this enactment, the courts of England, as well as the courts in those states where mortgagees have the legal title and are entitled to the possession of the mortgaged premises, were accustomed to appoint a receiver on the motion of the mortgagee out of possession, only where equitable grounds existed therefor, and on the application of persons having only equitable mortgages, who were not in a position to recover the possession of the mortgaged premises in an action at law. See *Ackland v. Gravener*, *supra*; *Anderson v. Kemshead*, *supra*; *Union Trust Co. v. Railroad*, 4 Cent. Law J., 585; *Meaden v. Sealey*, 6 Hare's R., 620; *Tanfield v. Irvine*, 2 Russ., 149; *Mahon v. Crothers*, 28 N. J. Eq., 567; *Cortleyeu v. Hathaway*, 3 Stock., N. J., 39; *Johnson v. Tucker*, 2 Tenn. Ch., 398; *Henshaw, Ward & Co. v. Wells*, 9 Humph., 568-579; *Farnham v. Campbell*, 10 Paige, 598. .

The cases above cited put the appointment of a receiver upon equitable grounds; and the fact that the mortgagee has a legal right to the possession of the mortgaged premises after condition broken, and is permitted to enforce that right by an action at law, has been held in most of the courts a good

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reason for refusing the appointment, rather than for his appointment. It would seem, therefore, that the fact that the law prohibits the mortgagee from obtaining the possession of the mortgaged premises by any action at law, until after foreclosure and sale, is an argument in favor of the exercise of the power on the part of a court of equity to make, rather than refuse, the appointment.

We find no courts in this country which have denied the power of a court of equity to appoint a receiver on the application of the mortgagee in a foreclosure action, except the courts of Michigan and California. *Wagar v. Stone*, 36 Mich., 364; *Guy v. Ide*, 6 Cal., 99.

Although we have the highest respect for the opinions of the learned courts making these last decisions, we are inclined to hold that the reasons advanced in them are insufficient to overturn the general current of authority against them; and that we should hold with the current of authority above cited, had the question been an entirely new one in this court.

In the cases of *Gillett v. Eaton*, 6 Wis., 30; *Tallman v. Ely*, id., 244; *Stark v. Brown*, 12 Wis., 572; *Hennesy v. Farrell*, 20 Wis., 42, and *Roche v. Knight*, 21 Wis., 324, this court held that if the mortgagee obtained the peaceable possession of the mortgaged premises without foreclosure sale, after the condition of the mortgage had been broken, the mortgagor could not turn him out of such possession by an action of ejectment, or by any other legal or equitable proceeding, until he paid the amount due on the mortgage, or until the same had been paid by the application of the rents and profits.

These cases do not go upon the ground that the mortgagee, by the act of taking possession, acquires any legal title to the fee of the land mortgaged. He does not defend upon the ground of his title at law, but upon the equitable ground that, having a lien upon the property in his possession by contract with the owner of the fee, and his right to the payment of the amount of his lien having matured and remaining undis-

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charged, it is equitable that the lien-holder, being in possession of the property to which his lien attaches and out of which his debt is to be paid, should be permitted to hold such possession, and apply the rents and profits which can be derived by such possession to the discharge of his debt, until the same shall be paid.

To sustain the position taken by the learned counsel for the appellant, it would be necessary to overrule these cases; for if, as is urged, the mortgagor is entitled absolutely to the possession of the mortgaged premises irrespective of all equitable considerations, until a foreclosure and sale, the law having secured to him the legal title until that event takes place, it would be impossible to sustain the right of the mortgagee to the possession, however acquired, until after foreclosure and sale. These decisions clearly recognize the equitable right of a mortgagee, after condition broken, to appropriate to the payment of his mortgage debt the rents and profits of the mortgaged estate, by his own acts; and if he is permitted to do that under any circumstances, it would seem that a court of equity would have the power to do it for him, in a case where the circumstances clearly show that unless it be done he will necessarily lose some part of his mortgage debt.

Although the mortgagee has no legal estate in the lands mortgaged, yet this court has recognized that he has an equitable interest which the courts are bound to protect, and that the mortgagor must in some respects be considered in possession for the benefit of the mortgagee. He holds the estate mortgaged in some respects as trustee for the benefit of the mortgagee; and a court of inquiry will interfere to prevent the destruction or waste of the mortgaged estate by the mortgagor and those claiming under him, when such destruction or waste endangers the security of the mortgagee. *Avery v. Judd*, 21 Wis., 262; *Jones v. Costigan*, 12 Wis., 677; *Seatoff v. Anderson*, 28 Wis., 212; *Fairbank v. Cudworth*, 33 Wis., 358. These cases, and many more which might be cited,

show that courts of equity in this state will interfere to protect the rights of the mortgagee in the property mortgaged, and, where necessary to secure the mortgaged debt, will interfere to prevent its destruction or waste, so that it may be applied in its entirety to the payment of the debt secured by its pledge.

The only case in this court where the direct question of the appointment of a receiver of the rents and profits of the mortgaged estate, in order to appropriate the same to the mortgage debt, was presented, is *Finch v. Houghton*, 19 Wis., 150. In that case the court below appointed a receiver of the rents and profits of the mortgaged premises, pending an action to foreclose a mortgage, upon allegations and proofs of a like nature to those upon which the court in the case at bar made the appointment; and, upon an appeal from that order, this court affirmed the appointment. Justice COLE, who wrote the opinion, says: "We are satisfied, from the affidavits read upon the hearing of the application, that a *prima facie* case was established for the appointment of a receiver. The decided weight of testimony tends to show that the mortgaged premises are not an adequate security for the payment of the mortgage, while those personally liable are probably not able to pay the deficiency. The whole mortgage debt is due, and considerable interest, which was payable annually, remains unpaid. Besides, those in possession neglect to pay the taxes, and there are many circumstances disclosed which tend strongly to show that the appellant has endeavored to obtain some tax deeds upon the mortgaged property to defeat the mortgage. It appears that he is the owner of the equity of redemption, in possession, and therefore an indispensable party to an action of foreclosure; . . . and, as there are some circumstances which tend to throw suspicion on the fairness of the appellant's conduct, a receiver was rightfully appointed." This decision was made in 1866, and from that time to the present no question has been raised as to the authority of that decis-

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ion; and from personal observation we know that it has been a common practice in the circuit courts of the state to appoint receivers in foreclosure actions.

This case must therefore be conclusive on us of the power of the circuit courts to appoint receivers in foreclosure actions, unless there has been some change in our laws which destroys the authority of that decision.

It is insisted by the counsel for appellant, that this decision is not applicable to the case at bar, for the reason that when that mortgage was given the mortgagor had no right of redemption after foreclosure and sale, and that chapter 195, Laws of 1859, which secures to the mortgagor a right to redeem the lands for one year after the foreclosure sale, prevents the issuing of a deed until after the expiration of such year, and provides that the mortgagor shall remain in possession until the expiration of such year, is a clear legislative declaration that the mortgagee shall not have any benefit of the mortgaged premises under any circumstances until after the time for redemption has expired; and that the law which now prohibits any sale until one year after the judgment of foreclosure is entered, is equally conclusive of the intention to prohibit any right of possession on the part of the mortgagee until after the expiration of such year.

As the law now stands, there is no redemption after sale. The statute simply delays the sale for one year after judgment. As the law stood when the mortgage was given upon the foreclosure of which a receiver was appointed in the case of *Finch v. Houghton*, *supra*, it secured to the mortgagor the right to the possession until a sale was made, as absolutely as it does now. It cannot be said that the right of the mortgagor now to remain in possession after judgment for one year, until after the sale is made, is any more sacred than it was then to remain in possession until after judgment and until sale made, under the old law; and yet this court held, in the case above cited, that, when equity and good conscience de-

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manded, in order to protect the interest of the mortgagee, he might be removed from the possession before judgment and sale. If, under the law as it now is, the right of possession is inviolable in the mortgagor until after the sale made, it was equally so under the law as it stood previous to 1859. Both the courts which have held that a receiver could not be appointed in a foreclosure action, held that they could not be appointed *pendente lite* and before judgment. *Guy v. Ide* and *Wagar v. Stone*, *supra*. And both put the decision on the ground that the legal title and the right of possession were secured to the mortgagee by statute. That the possession is secured to the mortgagor for a longer or shorter time, by statute, cannot change the principle; and if the right to appoint a receiver may be exercised by the court before the expiration of the shorter period fixed by the statute, it may with equal propriety be exercised before the expiration of the longer period. There is nothing, therefore, in the laws extending the time before a sale can be made upon a foreclosure judgment, which detracts from the authority of the case of *Finch v. Houghton*, *supra*.

There has been one other change made in the statutes of this state upon the subject of the rights of mortgagors and mortgagees, which we will notice, although it has perhaps very little to do with the determination of this case. Previous to the revision of 1878, section 1, ch. 101, R. S. 1858, provided that a tenant might attorn to a mortgagee after the mortgage had been forfeited. Under this provision it is probable that a tenant of a mortgagor might, after the forfeiture of a mortgage upon the estate held by him, have paid rent to the mortgagee, and in that way have effectually put the mortgagee in possession, even against the wish of the mortgagor. This section has been very seldom, if ever, acted upon in this state, and I have no knowledge of any case in this court where its effect has been commented upon, although it might have been used, perhaps, with some force in sustaining the

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decisions of this court above cited, which hold that a mortgagee in possession, after condition broken, cannot be evicted by the mortgagor until the mortgage debt is paid. This provision, which was considered incongruous and not in accordance with the spirit of the laws upon the subject of the rights of mortgagors and mortgagees, was repealed by the revision of 1878, and no tenant can now attorn to a mortgagee, or one claiming under him, until after foreclosure, sale, and conveyance to the purchaser on such sale. See section 2182, R. S. 1878.

The statute above referred to was neither considered nor commented upon in the decisions of this court above cited, and its repeal cannot therefore affect the authority of such decisions.

The counsel for the appellant insists that the court has no authority to appoint a receiver after judgment, or intermediate the judgment ordering a sale and the sale. We think the authorities show very clearly that a receiver may be appointed after judgment and before sale, especially when the sale is delayed for some considerable length of time thereafter. In the following cases the appointment was made after judgment, and approved: *Bank v. Tallman*, 31 Barb., 201; *Smith v. Tiffany*, 13 Hun, 671-2; *Astor v. Turner*, 11 Paige, 436; *Hackett v. Snow*, 10 Irish Eq., 220; *Cooke v. Gwyn & Wight*, 3 Atkins, 690; *Thomas v. Davies*, 11 Beavan, 29; Jones on Mortgages, § 153. We think there would be great propriety in many cases in delaying the appointment until after the rights of the parties are fixed by the judgment, and especially so where there is a dispute as to the amount actually due upon the mortgage, or where there is a question as to what real estate the mortgage covers. In cases of this kind great injustice might be done by the appointment of a receiver before judgment, whereas after judgment, when the amount of the mortgage claim is fixed, and the property subjected to the payment of the same ascertained, the court is in a much more

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advantageous position for determining whether equity requires the appointment of a receiver or not.

It is also objected that the whole amount of the mortgage debt is not due, and that the mortgaged premises are of ample value to pay the amount due, with the costs. There might be some force in this objection if the premises could be sold, advantageously to the parties, in parcels; but in this case the court has determined that it is for the benefit of all parties that the whole of the mortgaged premises should be sold to pay the installment due; and in addition to that it appears that the whole sum secured by the mortgage will become due before a sale can take place under the judgment. We think, therefore, the case should be treated in the same manner as though the whole mortgage debt had become due when the judgment was entered.

It is also insisted that it does not appear from the proofs that the mortgagor is insolvent and unable to pay the mortgage debt, if there should be a deficiency after the mortgaged premises are sold. The evidence shows that the mortgage is upon the homestead of the mortgagor; that he has neither paid the interest nor any part of the principal; that the mortgage debt is probably more than the mortgaged premises could be sold for; and that there are other judgments against the mortgagor which are unsatisfied. We think, in the absence of any rebutting proofs, the insolvency of the mortgagor is sufficiently established.

The objection that the complaint does not state any facts which would authorize the appointment of a receiver, we think, has no force where the appointment is not applied for until after judgment.

We agree with the counsel for the appellant that the court should not appoint a receiver in a foreclosure action unless the facts establish a case which clearly invokes the exercise of the equitable powers of the court, in order to protect the mortgagee against loss and injury which will necessarily result to

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him by reason of the acts or negligence of the mortgagor or those claiming under him. We think the facts in this case show that the mortgagor, by his willful neglect in not paying the taxes, is casting a burden upon the mortgaged estate which equity demands he should discharge. It is clearly a want of good faith on the part of the mortgagor to neglect to pay the interest on the mortgage debt, or to pay the taxes upon the mortgaged property, and yet remain in possession, and appropriate all the profits of the use of the estate to his own purposes.

We are clearly of the opinion that there was no abuse of the discretion of the court in appointing a receiver in this case.

Whether the court ought not to have excepted the homestead, consisting of the dwelling-house and 40 acres of land upon which the same is situate, from the effects of the order, it is unnecessary to determine on this appeal. If the appellant desires the homestead exempted, he can apply for a modification of the order in that respect, and, as we understood the counsel for the respondent, there would be no objection to such modification.

By the Court.—The order of the circuit court is affirmed, without prejudice to the right of the appellant to apply for a modification of the order as above suggested.

 TURNER VS. BURNELL, Garnishee.

December 18, 1879—January 7, 1880.

Compromise of doubtful claim.

T., a creditor of M. & K., having a doubtful claim to subject to the payment of the indebtedness due him certain insurance moneys also claimed by K., knowing that K. had assigned his right to such insurance moneys to B., agreed with B., in consideration of \$200 paid him by the latter for sums which T. claimed to have advanced for premiums on the policies,

48	221
106	268

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to relinquish all claims against the insurance company for such moneys, and thereupon consented to the payment thereof by the company to B. In the absence of any evidence that such agreement was procured by fraud or imposition: *Held*, that T. cannot, in his action against M. and K., recover from B., as garnishee, any part of the moneys so paid to him, on the ground that the assignment to him was void as against his assignor's creditors.

APPEAL from the Circuit Court for *Winnebago* County.

This was a proceeding in garnishment, the principal suit being against E. McNutt and J. B., W. G. and H. C. Killips, constituting the firm of McNutt & Killips. The facts found by the circuit court were as follows: In August, 1878, J. B., H. C. & W. G. Killips were partners under the name of Killips & Sons, and, as such, owners of a mill and machinery in Winneconne. Prior to that time, said firm had given plaintiff a chattel mortgage of a portion of said machinery, to secure payment of \$1,500. *Turner*, the plaintiff, was a banker or broker at Winneconne, and agent for divers insurance companies, with power to issue policies; and as such agent he procured insurance, in certain of said companies, upon said mill and machinery. On the 30th of August, 1878, the mill and machinery were burned; there being then policies upon the same in three of said companies amounting to \$2,500, viz., one of \$1,000 in the German American Insurance Company, one of \$1,000 in another, and one of \$500 in a third company. At the time of the loss, none of the Killipses had seen the policies or knew the amount of the insurance obtained upon the property by *Turner*, such insurance having been procured and paid for by him without their direction; and after the loss they "claimed" that *Turner* "would give them no information as to the policies or the amount of insurance, except that he claimed that all said insurance was payable absolutely to him." On the 2d of September, 1878, Killips & Sons retained *Burnell*, who is a lawyer residing in the city of Oshkosh, and advised with him concerning their said insurance, representing to him that they expected to have trouble and perhaps litiga-

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tion with *Turner*, and also with the insurance companies, and that they had no money to pay for a retainer, or for such service as he might render. Thereupon, at the suggestion of *Burnell*, it was agreed that they should assign to him all their interest in the policies in payment for any services which he might render them in any litigation they might have concerning such loss by fire; and accordingly, on that day, they executed to him an assignment of their interest in such policies, such assignment purporting on its face to be made in consideration of \$500 in hand paid to the assignors, "and of divers other good and valuable considerations;" and, in consideration of such assignment, *Burnell* executed to them an agreement to render his services in conducting such litigation, and in settling with the companies or with *Turner*. Between the 2d and the 27th days of said month of September, Killips & Sons did advise, at various times, with *Burnell*, as an attorney-at-law, concerning said matters; and at some time during the same period *Burnell* notified the insurance companies of said assignment to him. About the 27th of said September, "it was claimed that said companies were ready and willing to pay said loss without litigation;" and on that day *Turner* and his attorney, with H. C. Killips, *Burnell*, and one or two adjusting agents of the insurance companies, met in the city of Oshkosh. The adjusting agent who represented two of the companies had drafts amounting to \$1,500 (the amount which said two companies were to pay), which drafts were payable to the order of Killips & Sons, *Burnell* and *Turner*. In each of said policies it was written that the loss was payable to *Turner*, as his interest might appear, and not absolutely; but otherwise the policies were payable to Killips & Sons, the owners of the property; and *Turner's* interest therein was only that created by the \$1,500 chattel mortgage above mentioned. At this meeting, however, *Turner* claimed that the firm of McNutt & Killips [which seems to have been the successor to Killips & Sons, though there is no finding on that point] owed him a large

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sum of money, over and above the amount secured by the chattel mortgage; and he claimed the right to apply to that indebtedness the excess of the insurance moneys above the mortgage debt. This claim was resisted by *Burnell*; and at that time *Turner* "finally abandoned" such claim. As no money could be obtained on said drafts unless they were indorsed by all the payees, it was agreed, by way of compromise and settlement of the matter, that in consideration of *Burnell* paying *Turner* \$200 (which amount *Turner* claimed to have paid in obtaining such insurance), the latter should relinquish all claim to have any other part of the insurance money applied to the payment of the indebtedness to him not secured by said chattel mortgage; so that *Turner* was to receive \$1,700 of the insurance money, and *Burnell* \$800. Thereupon *Turner* executed the following agreement: "In consideration of \$200 premium on policies allowed me, I hereby relinquish all claims against the German American Ins. Co. for insurance on the mill building," etc., describing the property; "and nothing above is to be construed as a release of my claim for loss upon property covered by my chattel mortgage which I still hold." This agreement was made with full knowledge of the facts, including the fact of the assignment made to *Burnell* by Killips & Sons; and in pursuance thereof the drafts for \$1,500 above mentioned were indorsed by all the payees therein named, and *Turner* received \$1,100, and *Burnell* \$400, of the amount, less the interest on each of said sums for sixty days, which was deducted by the companies. About a week or ten days thereafter, a draft for the remaining \$1,000 of the insurance money became payable to the order of the same payees, and was duly indorsed by them, and, in pursuance of the aforesaid agreement, *Burnell* received of such moneys \$400, and *Turner* \$600, less the interest for sixty days, deducted by the companies. The agreement made September 2, 1878, between Killips & Sons and *Burnell*, as above stated, "in the absence of any waiver on defendant's part, was void as to creditors,

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except a reasonable compensation to be taken out of such insurance moneys for the services of *Burnell*." At the commencement of these garnishment proceedings, *Burnell* had in his hands no property, money, effects or credits belonging to Killips & Sons or to any member of that firm.¹

Upon these findings the court held that the assignment to *Burnell*, by Killips & Sons, of their interest in the policies, was good as between the parties thereto, but void as to creditors, except so far as *Burnell* might retain, from the moneys received under the assignment, the reasonable value of his services as attorney; that the agreement of September 27th, however, between *Burnell* and *Turner*, was a waiver of *Turner's* right to any of the insurance moneys claimed by *Burnell*, and the payment of the \$200 by *Burnell* to *Turner* estopped the latter from claiming such right. Accordingly, the court rendered judgment dismissing the proceedings in garnishment, with costs in favor of the garnishee. Plaintiff excepted to most of the findings of fact, and to the conclusion of law that, as against *Burnell*, he had waived his rights as a creditor of the Killipses, or estopped himself from asserting them; and he appealed from the judgment.

H. B. Jackson, for appellant:

The assignment to the garnishee defendant was fraudulent and void; the finding of the court on this point cannot be disturbed. *Cunningham v. Brown*, 44 Wis., 72, 77; *Ely v. Daily*, 40 id., 52. This being the case, the \$200 paid by him to the plaintiff was the money of the Killipses; and, being used to pay a legal obligation of theirs, it furnished no consideration for a further agreement or a waiver. *Shapley v. Abbott*, 42 N. Y., 447; *Holden v. Putnam Fire Ins. Co.*, 46 id., 11; *Wilcox v. Howell*, 44 id., 398. Estoppel *in pais* is resorted to as a means to prevent injustice; the defendant seeks to use it as a shield for fraud. He has been in no way dam-

¹The two last propositions are given here as "findings of fact," because they so appear in the record.—REP.

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aged or misled by the act of the plaintiff. His testimony shows that he was attorney for Killips, and all the claim he had was for \$300. The rest was Killips' money; and to require its payment to the latter cannot injure the defendant. Plaintiff cannot be held to have ratified the fraudulent assignment except by the clearest evidence that he so intended, and that he did so with complete information and perfect freedom of volition. In fact, the plaintiff was ignorant of the truth relating to the feigned consideration of \$500 mentioned in said assignment. *Vide* Wait's Actions and Defenses, 470, 471, and cases there cited; Bigelow on Estoppel, 2d ed., 451; 47 N. Y., 410.

Charles W. Felker, for respondent, among other things, contended, 1. That plaintiff treated with defendant as owner of the fund, with full knowledge of the facts, and obtained a concession by way of compromise which he does not offer to restore. This constitutes an equitable estoppel. *Frost v. Saratoga Ins. Co.*, 5 Denio, 154; *Dezell v. O'Dell*, 3 Hill, 221; *Newman v. Hook*, 37 Mo., 207; *Carpenter v. Stilwell*, 12 Barb., 135; *Eldred v. Hazlett's Adm'r*, 33 Pa. St., 316; *Roe v. Jerome*, 18 Conn., 138; *Cowles v. Bacon*, 21 id., 451; *Dyer v. Cady*, 20 id., 563; *Preston v. Mann*, 25 id., 118; *White v. Fox*, 29 id., 570; *Miner v. Phœnix Ins. Co.*, 27 Wis., 693; *Webster v. Phœnix Ins. Co.*, 36 id., 67; *Northwestern Ins. Co. v. Germania Ins. Co.*, 40 id., 446; *Strong v. Ellsworth*, 26 Vt., 366; *Lucas v. Hart*, 5 Iowa, 415; *Canal Co. v. Hathaway*, 8 Wend., 483; *Horn v. Cole*, 12 Am. Law Reg., N. S., 303. 2. That plaintiff had his election to treat the assignment as void *in toto*, or to treat it as valid and negotiate for an equitable compromise, and must be confined to the course which he first adopted. He cannot now be heard to allege that the assignment is fraudulent. Bigelow on Estoppel, 578, and cases there cited; *Rodermund v. Clark*, 46 N. Y., 354; *Morris v. Rexford*, 18 id., 552; Bump on Fraud. Conv., 458, 461, and cases there cited; *Renwick v. Bank of*

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Chillicothe, 8 Ohio, 530; *Fitch v. Baldwin*, 17 Johns., 161; *Jenness v. Berry*, 17 N. H., 549; *Lemay v. Bibeau*, 2 Minn., 291; *Scott v. Edes*, 3 id., 377; *Johns v. Bolton*, 12 Pa. St., 339; *Okie v. Kelly*, id., 323; *Irwin v. Longworth*, 20 Ohio, 581; *Dingley v. Robinson*, 5 Me., 127.

COLE, J. The evidence, to our minds, clearly shows that the plaintiff, in consideration of being paid \$200 for premiums which he claimed to have advanced in effecting the insurance upon the mill and machinery of Killips & Sons, agreed to relinquish, and did in fact relinquish, all claim and right to the balance of the insurance money in the hands of the garnishee. The court below so found as a matter of fact, and we think no other conclusion could fairly be deduced from the testimony. The language of the instrument bearing date September 27, 1878, is very plain and explicit, showing that such was the understanding of the parties at the time of its execution. Indeed, it would be difficult more clearly to express that intention than it is expressed in this writing, when considered in connection with the other testimony. The agreement was in the nature of an adjustment or compromise of a doubtful claim preferred by the plaintiff; and for a valuable consideration he agreed to relinquish all claim upon the insurance money except that for the loss of the property covered by his chattel mortgage. Having made that agreement, having relinquished a doubtful claim to the whole fund in the hands of the garnishee, for a certain sum paid him, it is difficult to perceive any valid reason why he should not stand by his agreement. It is said by his counsel that he did not know, at the time, what was the real consideration for the assignment made by the Killipses of their interest in the insurance money to the garnishee. But he certainly had ample notice that whatever interest these parties had in that fund had been assigned to *Mr. Burnell*; and the evidence satisfactorily proves that the plaintiff treated with *Mr. Bur-*

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nell in the matter as the real or pretended owner of that fund.

There is not the slightest pretense for claiming, as we think, that there was any fraud or imposition in the transaction. Suppose the assignment was made by the Killipses with a fraudulent intent to place the fund beyond the reach of their creditors—an inference which the evidence scarcely warrants: yet the plaintiff saw fit to abandon and relinquish all claim upon it, to let the assignment stand, in consideration of \$200. And as there is no sufficient evidence that the agreement was procured by fraud, or that any improper means were used to secure its execution by the plaintiff, it seems to us it should be enforced according to the intention of the parties at the time it was made. It was argued by the learned counsel for the plaintiff, that the agreement in fact had no reference whatever to the money in the hands of the garnishee; that it related solely to another matter, namely, the abandonment by the plaintiff of an unfounded claim he had made to the whole insurance, based upon an erroneous construction of the policies. But we are unable to adopt that view as to the intent of the parties, or the effect of the agreement, more especially when the instrument is read in the light which the other testimony throws upon it. The plaintiff himself admits that before he executed the agreement he was informed at the Beckwith House, by the adjuster, that *Burnell* claimed the interest of the Killipses in the insurance money, under an assignment from them, and that *Burnell* was present asserting his claim.

It was doubtless in view of that claim, and in consideration of the \$200 paid, that the plaintiff thought best to execute the agreement, for the very natural reason that it was for his interest to take that sum rather than run the risk of losing all. At all events, the fact is indisputable, that by the arrangement made the plaintiff obtained \$200, which he retains; and, having secured this advantage, it would not seem to be in

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accord with the principles of fair dealing to suffer him to repudiate the arrangement and attack the *bona fides* of the assignment to the garnishee. We do not deem it necessary to consider the question, so fully discussed by counsel on both sides, whether the plaintiff could subject this insurance money, which belonged to the Killipses, to the payment of his debt against the firm of McNutt & Killips. It is sufficient for this case to say, as we feel authorized to do upon the evidence, that the plaintiff knew that his insurance money had been assigned by the Killipses to the garnishee, who claimed to own it, and he saw fit to make the arrangement about it he did; and, having agreed to relinquish what might perhaps prove an uncertain and contested claim for a certain sum paid, he should abide in good faith by his agreement.

These views are decisive of the case.

By the Court. — The judgment of the circuit court is affirmed.

 CRONINGER and another vs. PAIGE.

December 17, 1879 — January 7, 1880.

WARRANTY: PLEADING: DAMAGES. (1) *Warranty construed.* (2) *Breach of warranty as a defense.* (3) *Variance.* (4) *Counterclaim for breach of warranty: measure of damages.*

1. An agreement by the vendor of a "heater," "to protect the sale from infringements on other heaters," construed as a warranty that the article sold was not an infringement of any patent.
2. In a suit by the vendor in such contract, for the purchase price, the vendee may defend on the ground that the article sold was in fact an infringement of a patent, and that, within a reasonable time, he offered to return it upon that ground, and has kept the offer good.
3. If the answer, while alleging (by way of defense) the infringement and defendant's offer to return, does not count upon the contract in accordance with the construction here given it, still, the contract being put in evidence by plaintiff, the variance may be disregarded, or the answer amended.

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4. If the vendee has not kept good his offer to return, he may counterclaim in the vendor's action the damages accruing to him from the fact that the article infringes a patent, viz: the difference between the value of the article with the right to use it, and its value without that right. And where it appears that the right can be purchased for less than the price of the article, the price of the right is generally the measure of his damages.

RYAN, C. J., dissented from the judgment.

APPEAL from the County Court of *Winnebago* County.

Action to recover the price of an "Armstrong heater," sold by the plaintiffs to the defendant. On the sale, the plaintiffs agreed "to protect sale from infringements on other heaters." Defendant agreed to accept a draft for the price of the heater ninety days after the sale, payable in ten days after acceptance.

A claim was afterwards made to the defendant, by Stilwell & Bierce, that the heater was an infringement of a patent owned by them; and thereupon the defendant refused to accept a draft for the price which was presented to him for acceptance at the stipulated time, and then offered to return the heater to the plaintiffs. The foregoing facts appear from the pleadings, proofs and findings.

The cause was tried before the county judge, a jury having been duly waived. On the trial, the defendant offered evidence to prove that the heater in question was an infringement of the patent of Stilwell & Bierce, but the court refused to receive the evidence.

The court held, in substance, that the agreement "to protect sale from infringements on other heaters" was only an undertaking to indemnify the defendant against loss in case the heater was an infringement upon some patent; and that, if it was such an infringement, inasmuch as he had lost nothing thereby, he had no defense to the action. Judgment was therefore rendered for the plaintiffs for the contract price of the heater. The defendant appealed.

John W. Hume, for appellant:

If the heater was an infringement of a patent, not only

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was there a failure of title, but the sale was illegal, and no consideration for defendant's promise. *Pacific Iron Works v. Newhall*, 34 Conn., 67; *Dickinson v. Hall*, 14 Pick., 217, and cases there cited in defendant's brief, p. 220; *Bliss v. Myers*, 8 Mass., 47. Upon every sale there is an implied warranty of title, which in case of a patented article includes, of course, any patent right embraced therein. And this warranty is not excluded by express warranties upon other points. *Boothby v. Scales*, 27 Wis., 626; *Leopold v. Van Kirk*, id., 152. It is not a fair construction of the express warranty in this case, that defendant agreed to use the article and pay for it, if found to be an infringement, and rely on the plaintiffs to refund his damages. This would be presuming an illegal contract.

For the respondents, the cause was submitted on the brief of *Weisbrod & Harshaw*:

1. The second defense cannot be held a counterclaim, because not so pleaded or designated. *Stowell v. Eldred*, 39 Wis., 615, 630. 2. Want of consideration cannot be proved under a general denial, but the facts showing illegality, if any, must be alleged. Bliss on Code Pleading, §§ 330, 352. 3. But whatever defense may be allowable under the answer, there was no error in excluding the evidence as to infringement. The terms of defendant's order indicate knowledge that there was some dispute regarding the patent. All he wanted was indemnity, which plaintiffs gave him. He seeks in this action to determine questions of infringement, or of priority between owners of adversary patents, of which the state courts have no jurisdiction. *Rice v. Garnhart*, 34 Wis., 462; *Page v. Dickerson*, 28 id., 694; *Elmer v. Pennel*, 40 Me., 430. There is no failure of consideration, because he received what he intended to buy. Benjamin on Sales, 309. Having himself sold the patented article, he cannot defend on the ground of worthlessness of the patent. *Thomas v. Quintain*, 5 Duer, 80, and cases there cited.

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LYON, J. We think the undertaking of the plaintiffs to protect the sale of the heater from infringement on other heaters is something more than an undertaking to indemnify the defendant from loss or damages therefrom should it turn out that the heater was an infringement of some patent. The plaintiffs assumed to sell an article which the purchaser might lawfully put to its intended use, and it is reasonable to infer that the defendant intended to require them to stipulate that the use of it should not render him liable to prosecution for infringing a patent. We find nothing in the language of the contract which supports the view that the parties intended the defendant should take the risk of an infringement, without recourse to the plaintiffs, until he should be compelled to pay damages therefor at the end of a law suit. Had they so intended, it is reasonable to assume that they would have employed language to express such intention very different from that which they did employ.

It is the more reasonable view, that the defendant intended to require, and the plaintiffs to give, an undertaking or warranty that the sale and use of the heater would infringe no patent; and although the contract is awkwardly expressed, we think the term "protect sale" admits of, and should receive, the construction above indicated.

It must be held, therefore, that the plaintiffs undertook and warranted that the heater was not an infringement of any patent.

If it was such an infringement, the warranty was broken immediately upon the sale, and the lawful remedies for such breach then became available to the defendant. It has long been the settled law of this state, that, for a breach of warranty on the sale of goods, even though there is no actual fraud on the part of the vendor, the purchaser may rescind the sale by returning or offering to return the goods within a reasonable time. *Boothby v. Scales*, 27 Wis., 626, and cases cited in the opinion by DIXON, C. J. This rule is usually ap-

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plied in cases where the article sold is not as warranted; but no good reason is perceived why it is not equally applicable to a case like this, where the warranty goes to the right to sell and use the article. The defendant answered and proved an offer to return the heater to the plaintiffs. The offer was made when the draft for the price thereof was presented to him for acceptance; and it is not denied that it was made within a reasonable time. He also offered to prove that the heater was an infringement of the Stilwell & Bierce patent, but the testimony was rejected. To make his offer to return available as a defense to the action, it was incumbent upon the defendant to prove the infringement. Hence, if the county court had jurisdiction to try the question of infringement, the testimony should have been received.

This court has held that in an action brought in a state court to recover the price agreed to be paid for a patent right, or for the right to manufacture and sell a patented article, the defendant, for the purpose of showing want or failure of consideration, may show that the patent is void, and for that purpose may prove that the invention is valueless, or that the patentee was not the inventor of the patented article; and he may establish the fact that the patentee is not the inventor, by proof that the invention had been in use before the patent issued, or that the patent is an infringement of a prior patent. *Rowe v. Blanchard*, 18 Wis., 441; *Page v. Dickerson*, 28 Wis., 694; *Rice v. Garnhart*, 34 Wis., 453.

At the same time it was freely conceded in those cases that the federal courts have exclusive jurisdiction of all actions to annul letters patent, or actions between owners of adversary patents, to determine questions of infringement or priority.

It does not appear that the "Armstrong Heater" is a patented article, unless it is covered by the patent of Stilwell & Bierce. The record does not show that the plaintiffs claim any patent upon it. The validity of Stilwell & Bierce's patent is not assailed. The only question is, whether the "Arm-

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strong Heater " is covered by their patent. Hence, we have here no question of the validity of a patent right, and no contest between adversary patentees.

We are clearly of the opinion that the rejected testimony should have been received; and, on the authority of the cases above cited, we should strongly incline to the same opinion were the question of the validity of a patent involved in the issue.

The fact that the heater in controversy is an infringement of Stilwell & Bierce's patent, and the offer to return the same to the plaintiffs, are alleged in the answer. The answer also alleges a contract by the plaintiffs to protect the defendant in the use of the heater and against suits brought against him for using it. In the statement of the contract the answer is somewhat obscure, and it may be that it does not count upon the contract in accordance with the construction we have given it. But the contract was introduced by the plaintiffs as a part of their case; and, if there is a variance between it and the answer, the variance is immaterial, and may be disregarded, or the answer may be amended at any time to correspond with the facts. It would have been better pleading had it been averred in the answer, as the fact is, that the plaintiffs undertook and promised to protect the sale of the heater from infringements on other heaters.

The facts stated in the answer are pleaded as a defense to the action, and not as a counterclaim. Under the contract, as we construe it, had the defendant proved, in addition to his offer to return the heater, that it infringed the patent of Stilwell & Bierce, he would have established a valid defense to the action. It follows that those facts are well pleaded as a defense.

It does not appear whether the defendant has kept good his offer to return the heater. He may have used it with or without purchase of the right to do so from Stilwell & Bierce, or he may have sold it. In either case he is not in a situation

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to return it and thus defeat the action, but his only remedy will be to interpose a counterclaim for damages. If the exigencies of the case demand it, the county court will allow further pleadings in that behalf. The rule of damages on such counterclaim is the difference between the value of the heater with the right to use it, and its value without such right. The amount of such difference will generally be the value of the royalty, as it is called, or the right to manufacture, sell or use a patented article.

We find in the record (though we are not sure that it is part of the evidence) a letter from Stilwell & Bierce to the defendant offering to sell him the right to use the heater in question for \$35. If, therefore, the defendant proves the infringement claimed, it is probable that the damages can be readily ascertained.

By the Court.—The judgment of the county court is reversed, and the cause remanded for a new trial.

RYAN, C. J., dissented.

POTTER VS. STRANSKY, imp.

December 20, 1879 — January 7, 1880.

48 236
97 277

ASSIGNMENT OF SECURITIES: LIMITATION OF ACTIONS: RECORDING ACT.

(1) Assignment construed as made to a partnership. (2) When mortgage not affected by limitation of actions upon simple contract debts. (3) Who entitled to protection of recording act. (4) Attestation of instrument for record. (5) Question of good faith in assignment of securities.

1. An assignment of note and mortgage purported to be in consideration of a specified sum paid the assignor by three persons named, who in fact constituted the firm of W. & P., and it assigned the instruments to "the said W. & P.," for their use and benefit, with condition that if the assignor should pay to W. & P. a specified sum by a day named, the assignment should be void. The indebtedness thus secured was one to the firm of W. & P. Held, that the assignment was to the firm, and not to its individual members.

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2. The fact that the statute of limitations has run upon the note to secure which another note and mortgage were assigned, as well as upon the note originally secured by the mortgage, will not prevent the assignee from foreclosing the mortgage.
3. To render a prior assignment of a mortgage void as against one claiming under a subsequent one, on the ground that the former was not recorded, such claimant must show a recorded chain of title to himself from the common source of title, and that the instruments recorded in fact were *entitled* to record.
4. An assignment of a mortgage with only one attesting witness is not entitled to record.
5. After an assignment of a note and mortgage as collateral security for a debt, the mortgagee died without having paid such debt, and the administrator had not possession of the securities, and did not claim them as assets of the estate, and did not know of their existence until informed thereof by one C., to whom he assigned them for the sum, expressed in the instrument, of ten dollars. C. assigned the note and mortgage to S., who paid only \$225 for them, though the mortgage debt was then over \$1,600, and was seventeen years overdue, and the instruments were not in C.'s hands. *Held*, that S. was not a purchaser in good faith.

APPEAL from the Circuit Court for *Kewaunee* County.

Action to foreclose a mortgage on lands in Kewaunee county, executed by David Youngs and Charles L. Fellows to Moses Miller, August 26, 1857, to secure the payment of a promissory note of even date therewith, made by the mortgagors to the mortgagee or bearer, for \$500, and 12 per cent. interest, payable eighteen months after date. The action was commenced in 1877. .

The question in controversy is, whether the plaintiff or the defendant *Wyta Stransky* is the owner of the mortgage in suit.

The material facts, as shown by the pleadings, evidence and findings, are as follows: Under date of February 1, 1858, Moses Miller, the mortgagee, made his promissory note for \$525, and 10 per cent. interest, payable to Williams & Potter or order, twelve months after the date thereof, and delivered the same to the payees therein named. Williams & Potter

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were a copartnership firm doing business in the city of New York, the members of which were Richard S. Williams and George N. Williams (both since deceased), and the plaintiff, *Ellis S. Potter*.

As collateral security for the payment of the last mentioned note, in November, 1858, Miller, the maker thereof, transferred and delivered to Williams & Potter the note of Youngs & Fellows, above mentioned, and assigned and delivered therewith to that firm the mortgage in suit. Such assignment is in writing, indorsed on the mortgage, and expresses the purpose for which it was made. It was signed and sealed by Miller, but was not so executed as to be entitled to record, and was not recorded.

The firm of Williams & Potter was dissolved in 1862. Richard S. Williams died in 1864, and George N. Williams died in 1867. The mortgage in suit and the note it was given to secure, together with the note of Miller, remained firm assets, and were in the possession or under the control of the firm while it continued, and of the plaintiff, as the surviving member of the firm, after the decease of his copartners, until the trial of the cause. The plaintiff produced both notes and the mortgage at the trial, and testified that no payment had been made on either note.

Moses Miller died about the year 1874, intestate, and William H. Miller was duly appointed and qualified as administrator of his estate. In the inventory of the estate returned by the administrator, the note and mortgage of Youngs & Fellows are not included. The administrator did not know of the existence of such note and mortgage until 1875, when he was informed by one Clancy that there was such a mortgage. Clancy desired an assignment thereof, for the purpose, as he stated, of clearing the title, and at the same time stated to the administrator that it was invalid. The administrator thereupon executed an assignment of the note and mortgage to Clancy for the consideration of \$10 therein expressed.

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This assignment, although attested by but one subscribing witness, was recorded in the office of the register of deeds of Kewaunee county.

In 1876, Clancy executed an assignment of the same note and mortgage to the defendant *Wyta Stransky*, for the consideration therein expressed of \$10, and the same was duly recorded. The evidence tends to show that *Stransky* paid \$225 for such assignment.

Stransky proceeded immediately thereafter to foreclose the mortgage by advertisement, and the mortgaged premises were sold to him, pursuant to such foreclosure proceedings, by the sheriff of Kewaunee county. The sheriff gave *Stransky* the usual certificate of sale, bearing date August 19, 1876, by which it appears that the property was bid off by *Stransky* for the sum of \$1,696.

A part of the relief prayed in the complaint is, that the sheriff (who is made a defendant in the action) be enjoined from executing a conveyance of the mortgaged premises to *Stransky*, under the sale and certificate, and that *Stransky* be enjoined from transferring such certificate or receiving such conveyance.

The findings of fact by the circuit court differ in some particulars from the foregoing statement. These are sufficiently stated in the opinion.

Judgment was entered for the defendant *Stransky* dismissing the complaint, with costs; from which the plaintiff appealed to this court.

For the appellant, there was a brief by *G. G. Sedgwick*, and oral argument by *Mr. Sedgwick* and *Wm. F. Vilas*:

1. The assignment from Miller to Clancy, being attested by only one witness, was not entitled to record; and it was therefore not evidence, and did not constitute constructive notice. *Ely v. Wilcox*, 20 Wis., 523; *Pringle v. Dunn*, 37 id., 449; *Wood v. Meyer*, 36 id., 308; *Gilbert v. Jess*, 31 id., 110; *Jones on Mortg.*, § 532, and cases there cited, §§ 473 and 527.

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There being no proof of title in Clancy, the record of the assignment from him to the defendant was not evidence. *Smith v. Lawrence*, 12 Mich., 431; *Farmers and Mechanics' Bank v. Bronson*, 14 Mich., 361; *Brinkman v. Jones*, 44 Wis., 498; *Sweet v. Van Wyck*, 3 Barb. Ch., 647. 2. The assignment to plaintiff was conditional, and, being under seal, constituted a mortgage of a mortgage, and the period of limitation was twenty years. *Power v. Lester*, 23 N. Y., 527; *Slee v. Prest. and Directors of Manhattan Co.*, 1 Paige, 48; *Jones on Mortg.*, § 139; *Wiswell v. Baxter*, 20 Wis., 680; *Whipple v. Barnes*, 21 id., 328. 3. *Stransky* was not a purchaser in good faith. The facts that Clancy had no record title; that the mortgage was overdue; that the price paid was so inadequate; and that his assignor could not deliver possession of the note and mortgage — were, all or any of them, sufficient to charge him with notice; and he took only the rights which his assignor possessed. *Davies v. Austen*, opinion of Lord THURLOW, 1 Vesey Jr., 247; *Trustees of Union College v. Wheeler*, 61 N. Y., 88, 104; *Bush v. Lathrop*, 22 id., 535; *Fisher v. Otis*, 3 Pin., 87; 1 *Jones on Mortg.*, §§ 476, 532, 884-5; *Cornell v. Hichens*, 11 Wis., 353; *Parsons on Notes*, 262; *Parsons on Con.*, 255; *Wade on Notes*, §§ 23, 24, 306; *Hoppin v. Doty*, 25 Wis., 573; *De Witt v. Perkins*, 22 id., 473; *Brinkman v. Jones*, 44 id., 498; *Kellogg v. Smith*, 26 N. Y., 18; *Brown v. Blydenburgh*, 3 Seld., 141; *Pickett v. Barron*, 29 Barb., 505; *Bump on Frauds*, 176; *White v. Denman*, 1 Ohio St., 110; 31 Wis., 110; 36 id., 308.

For the respondent, there was a brief by *R. L. Wing*, his attorney, and *H. G.* and *W. J. Turner*, of counsel; and oral argument by *W. J. Turner*. They contended, 1. That, upon dissolution before the death of either partner, the title to firm assets vested in all the partners individually, and an action did not lie by the surviving partner alone. 2. That the language of the assignment showed a transfer to the three individuals named, and not to the firm of Williams & Potter. 3. That

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the assignment to Clancy was properly found from the allegations of the complaint, where the making of the same is conceded. 4. That an assignee of a real estate mortgage is within the recording act, and the title of a subsequent assignee in good faith will prevail over a prior unrecorded assignment. R. S. 1858, ch. 86, secs. 25, 34 and 35; *Croft v. Bunster*, 9 Wis., 503; *Hoyt v. Jones*, 31 id., 389; *Campbell v. Vedder*, 3 Keyes, 178. Miller, the original mortgagee, being dead; his office having been destroyed by fire, as represented to *Stransky*; nearly twenty years having elapsed since the date of the mortgage; the first assignees being out of the state; and no one having any knowledge of the prior assignment until its accidental discovery by plaintiff among some worthless papers — it cannot be said that defendant was guilty of negligence in not obtaining delivery, or that he was chargeable with notice. The subsequent conveyance being first recorded, the burden of proof is upon the party attacking the transfer, to show fraud. *Hoyt v. Jones* and *Campbell v. Vedder*, *supra*; *Purdy v. Huntington*, 42 N. Y., 348; *Greene v. Warnick*, 64 id., 220; *Kellogg v. Smith*, 26 id., 18; *Acer v. Westcott*, 46 id., 384; *Stoddard v. Rotton*, 5 Bosw., 387; *Peabody v. Roberts*, 47 Barb., 91. 5. That, the statute of limitations having run against the note to which the assignment was collateral, the plaintiff's remedy is gone. *Rundle v. Allison*, 34 N. Y., 180; *Bruen v. Hone*, 2 Barb., 586; *Kane v. Bloodgood*, 7 Johns. Ch., 90; *Gordon v. Bowne*, 2 Johns., 150.

LYON, J. I. The first question to be determined is, Can the plaintiff, if otherwise entitled to recover, maintain this action as surviving partner of the late firm of Williams & Potter; or should it have been brought in the name of the plaintiff and the heirs or personal representatives of the deceased members of that firm? The circuit court held that the plaintiff cannot maintain the action as such surviving partner. The ruling was doubtless based upon the language of

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the assignment by Moses Miller of the note and mortgage in suit, through which the plaintiff claims. That assignment is as follows: "In consideration of \$500 to me in hand paid by Richard S. Williams, *Ellis S. Potter* and George N. Williams, of the city and county and state of New York, I do hereby sell, assign, transfer and set over unto the said Williams & Potter the within indenture of mortgage, together with the note accompanying the same, for their use and benefit, hereby authorizing them to collect and enforce payment thereof in my name or otherwise; but this assignment is made upon this express condition, that if the said undersigned shall pay to the said Williams & Potter the sum of \$525 on or before the first day of February, 1859, with interest at the rate of ten per cent., this assignment to be void, it being made for the purpose of securing the payment of the said sum of \$525, with interest as aforesaid, and for no other purpose whatever."

The note given by Moses Miller to Williams & Potter, to secure which the note and mortgage in suit were assigned as collateral, was given for a debt which Miller owed that firm, and was the property of the firm. Had the collaterals been transferred by delivery merely, there is no room to doubt that the legal title thereto would have passed to the firm, and the firm could have maintained an action upon them. *Curtis v. Mohr*, 18 Wis., 615, and cases cited in Vilas and Bryant's notes. We see nothing on the face of the assignment to indicate an intention to assign them to the members of the firm as individuals, and not as copartners. We think that if a right of action to foreclose the mortgage under Miller's assignment has not been defeated by the subsequent assignment to *Stransky*, that right is in the plaintiff as the surviving partner of the firm to which Miller assigned the securities.

2. The circuit court found that "it does not appear by the proofs that the indebtedness for which the mortgage and note were assigned as collateral security remains unpaid." This is clearly an error. The plaintiff produced the note of Miller to

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Williams & Potter, and testified that it had not been paid. This testimony was not contradicted.

3. The circuit court also found that the statute of limitations had run against Miller's note, but it does not very clearly appear what influence that finding had upon the judgment. The fact is as found, but it seems to us that it is not an obstacle to a recovery by the plaintiff. Miller's assignment transferred to Williams & Potter all his interest in the note and mortgage assigned; and it is manifest that until he paid his note the firm could enforce any right in respect to the collaterals which Miller could have enforced had he not assigned them. One of these rights was to foreclose the mortgage and make all he could of the mortgage debt by a sale of the mortgaged premises pursuant to the foreclosure judgment. This he might have done after the statute of limitations had run against the note, but before it had run against the mortgage. *Wiswell v. Baxter*, 20 Wis., 680; *Kennedy v. Knight*, 21 Wis., 340; *Knox v. Galligan*, id., 470; *Edgerton v. Schneider*, 26 Wis., 385.

When Miller's note became due, Williams & Potter had three causes of action to enforce its payment: *first*, they might have sued Miller upon the note; or, *second*, they might have brought an action at law upon the collateral note of Youngs & Fellows; or, *third*, they might have proceeded to foreclose the mortgage. They have or may have lost their remedies by actions at law upon the notes; but the remedy in equity to foreclose the mortgage remains to them, or to the survivor of them. They have done no act which deprives them of that remedy.

Miller, in his life-time, after the statute had run against his indebtedness to Williams & Potter, could not have maintained an action against that firm to recover those collaterals, or their value, without showing that he had paid such indebtedness. And if he could not, the defendant *Stransky* cannot; for it is certain that, independent of the registry laws, which will be

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hereafter noticed, the latter takes, by his assignment, no greater rights in respect thereto than Miller had.

4. The circuit court found that *Stransky* purchased the note and mortgage in suit in good faith and for a valuable consideration, by an instrument in writing entitled to record and duly recorded; and held that the assignment by Miller to Williams & Potter was therefore void as to *Stransky*. This was an application to the two assignments of the registry law, as the learned circuit judge understood and construed it, giving priority to the recorded assignment to *Stransky* over the older unrecorded assignment to Williams & Potter.

The provisions of the recording act, which are relied upon to sustain the priority of *Stransky's* assignment, are contained in sections 25, 34 and 35, ch. 86, R. S. 1858, which are reenacted as sections 2241 and 2242 of the late revision.

Section 25 provides that "every conveyance of real estate . . . which shall not be recorded as provided by law, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall first be duly recorded." Sections 34 and 35 provide that the term "purchaser" shall be construed to embrace the assignee of a mortgage, and the term "conveyance" shall be construed to embrace "every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except wills, certain leases, and executory contracts for the sale or purchase of lands."

Had the mortgage in suit been conditioned for the payment of money, with or without covenant for payment, and unaccompanied by a note, and were *Stransky*, the assignee thereof by duly recorded assignments from Miller's administrators to Clancy and from Clancy to him, without notice of the assignment to Williams & Potter, it is probable that, under the above provisions of the statute, the unrecorded assignment under which the plaintiff claims, would be void as to *Stransky*.

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But the assignment to Clancy, although actually recorded, was attested by but one subscribing witness, and was not entitled to record. It is not available, therefore, as a recorded instrument; and *Stransky*, who is compelled to make title through it, is not protected by the recording acts. To be thus protected, he must show a valid recorded chain of title from Miller. *Fallass v. Pierce*, 30 Wis., 443.

Hence the question of priority must be determined as though none of the assignments were recorded; and in that case there can be no doubt that the first assignment is valid as against *Stransky*, and that the plaintiff is the owner of the note and mortgage.

Moreover, the mortgage was given to secure the payment of a note. It is a mere incident of the note, and the transfer of the note carries the mortgage with it without formal assignment. Unless *Stransky* purchased the note in good faith and for a valuable consideration, he is not a *bona fide* purchaser of the mortgage.

When the administrator of Miller's estate executed the assignment of the securities to Clancy, he had not possession of the securities, did not claim them as assets of the estate, and in fact did not know of their existence until Clancy gave him the information recently before the assignment was made. The consideration of that assignment was ten dollars, and the same was expressed in the instrument. *Stransky* is chargeable with notice (when he took his assignment from Clancy) that Clancy paid a nominal consideration only for the securities (which showed that they were considered valueless), and that the same were not in the possession either of the administrator or Clancy. Besides, *Stransky* paid but \$225 for the securities. It does not appear what the mortgaged premises are worth, but the mortgage debt at the time apparently amounted to over \$1,600, and at his sale of the premises *Stransky* bid them off at \$1,695. If the mortgaged premises were worth that sum, \$225 was a very inadequate consideration for the mort-

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gage. But, however that may be, in view of the other facts above mentioned, and the further fact that *Stransky* took his assignment more than seventeen years after the mortgage debt became due, we are clearly of the opinion that he is not an assignee of the mortgage in good faith. If authority is necessary to sustain what seems to us so plain a proposition, the cases cited in the brief of counsel for the plaintiff abundantly sustain it.

Because *Stransky* is not a *bona fide* assignee of the mortgage, as well as because of the defective execution of the assignment thereof to Clancy, it must be held that *Stransky's* assignment is not protected by the registry laws.

The above views are decisive of the case. It follows therefrom that the judgment must be reversed. The cause will be remanded with directions to the circuit court to give judgment for the plaintiff for the relief demanded in the complaint.

By the Court.— So ordered.

JARSTADT VS. MORGAN.

December 20, 1879 — January 7, 1880.

48	245
98	283
98	287

(1) ESTOPPEL to deny validity of record of village plat. (2) When grantee of lot in unrecorded village plat takes to the center of street.

1. In ejectment, lands conveyed to plaintiff (including that in dispute) being described in his deed by reference to corners and lines in a village therein named, he offered in evidence the record of the plat of said village (instead of the original plat), "for the purpose of proving the locality of the premises described in the complaint." Held, that he was thereby estopped to deny the validity of the record, and its legal effect as a dedication of streets.
2. When the owner of the land laid out into blocks and lots bounded by what are represented, on an unrecorded or defective plat, as streets, conveys a lot, referring in the deed to the plat as containing the true description of the premises, his grantee takes, as against the grantor and his assigns, to the center of the street upon which the lot abuts. So held in a case where the deed referred to the plat as "on record," and it was in fact recorded, though not entitled to record.

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APPEAL from the Circuit Court for *Manitowoc* County.

Ejectment. Defendant appealed from a judgment in favor of the plaintiff. The case is sufficiently stated in the opinion.

For the appellant, there was a brief by *Nash* and *Schmitz*, and oral argument by *Mr. Nash*:

1. Both the deed under which plaintiff claims, and that under which defendant claims, refer to the village plat of Clark's Mills; and defendant's deed was duly recorded several years before plaintiff's was executed. Therefore, not only did defendant acquire title to the south half of River street, but the plaintiff made his subsequent purchase with notice of that fact. *Hegar v. C. & N. W. Railway Co.*, 26 Wis., 624; *Weisbrod v. Same*, 21 id., 602; *Pettibone v. Hamilton*, 40 id., 402; *Dillman v. Hoffman*, 38 id., 559; *Salter v. Jonas*, 39 N. J. L., 469; 18 Wis., 35; 37 id., 662; 105 Mass., 328; 109 id., 292; 114 id., 577; 120 id., 349; 37 Conn., 229; 8 Bush (Ky.), 679; 9 id., 137; 10 R. I., 437; 37 Mo., 18; 49 id., 100.

2. The plaintiff, having himself offered the record of the plat in evidence, is estopped to say that it was not duly recorded. 1 Greenl. Ev., § 571; Bigelow on Estop., 609, 610.

3. Where a proprietor of lands makes and records a plat of the same, dividing them into village lots, and bounding the lots upon streets represented on such plat, and afterward conveys portions of the land by reference to the recorded plat, his grantee takes to the center of the streets bounding the land conveyed, although such plat is not entitled to record. *Simmons v. Johnson*, 14 Wis., 523; *Warden v. Blakley*, 32 id., 690; *Fox v. Union Sugar Refinery*, 109 Mass., 292.

For the respondent, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*. To the point that the record of the village plat, not properly certified, was incompetent evidence for the purpose of establishing a legal dedication, they cited R. S. 1849, ch. 41; *Vilas v. Reynolds*, 6 Wis., 214; *Gardiner v. Tisdale*, 2 id., 153; *Emmons v. Milwaukee*, 32 Wis., 434.

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COLE, J. The land which the plaintiff seeks to recover in this case, is a strip laid out and designated on the plat of the village of Clark's Mills as "River street." The defendant owns lots in block 1, abutting on the north on this street. Both parties claim under conveyances from Stephen S. Clark, one of the original proprietors, who made the plat. On the part of the plaintiff it is said that the plat was not properly certified and acknowledged so as to entitle it to record, and therefore did not operate as a grant of the land to the public for a street, and that he took the same under his conveyance. Both the deeds under which the parties claim the premises refer to the village plat. The defendant's deed conveys lots 1, 2, 3 and 4 in block 1, "according to the Clark's Mills village plat on record." In the plaintiff's conveyance the second course and distance describing the land is to commence "at the northwest corner of a piece of land heretofore deeded to Mary Carr; thence easterly, on the north line of said Carr land, to the northwest corner of lot 11, block 1, in the village of Clark's Mills, on the south side of the Manitowoc river, about 22 rods; thence northerly on the west line of said block 1 to the northwest corner thereof, being 20 rods; thence easterly on the north line of said block 1 about twenty rods, to the center of Main street; thence northerly," etc.

The record states that the plaintiff, for the purpose of proving the locality of the premises described in the complaint, offered in evidence *the record of the plat of the village of Clark's Mills*. Undoubtedly, under the decisions of this court, this plat could be resorted to for the purpose of identifying the land conveyed (*Vilas v. Reynolds*, 6 Wis., 214; *Simmons v. Johnson*, 14 Wis., 524; *Fleischfresser v. Schmidt*, 41 Wis., 223); but in this case the plaintiff, in order to explain his deed and establish his title to the strip in question, introduced the record of the plat. Under these circumstances, the plaintiff himself having relied upon the record to establish his title, his proof being fatally defective without the record, the

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question arises whether, when the defendant relies on the same record to show that there was, upon the north side and adjoining his lots, a street or highway, the plaintiff is in a position to say that the record is incompetent to prove that fact. It seems to us that he is estopped from taking the objection. Unless this is so, the plaintiff in effect says to his adversary: This record produced by me is sufficient for my purpose; it is good to establish my title to the premises; but it can prove nothing in your favor, because the original plat was not so certified and acknowledged as to entitle it to record. Of course, the plaintiff might have produced the plat itself to make good his title, and not have resorted to the record. But this he did not see fit to do, but put the record itself in evidence to make good his case. He must now stand by that record for whatever it tends to prove. That this record tends to show that the original proprietors intended there should be a street adjoining the defendant's lots on the north, which is called on the plat "River street," is a fact that is indisputable.

Further, it appears by the village plat that a certain quantity of land was surveyed and divided into blocks by the proprietors, and that block 1 was subdivided into lots. There were likewise streets laid out and named, which were fully described on the plat.

It does not appear that Mary street on the west and River street on the north of defendant's lots were ever opened and used by the public as highways. But it is absolutely essential for the enjoyment of lots 2 and 3, that River and Mary streets should be open to the full extent of the block for passage-ways. Now upon the facts of this case we are disposed to adopt this rule, namely: Where the owner of a tract of land, which is laid out into blocks and lots that are bounded on what are represented on an unrecorded or defective plat as streets, conveys lots, referring to the plat as containing the true description of the premises, thus making the plat

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a part of his deed, the grantee will take to the center of the street abutting on his lots, as against his grantor or assigns. It may well be that such grantee would not only take the fee to the center of such streets, but would also acquire the right to use all passage ways or streets on which his lots were bounded, and which were thus represented on the plat, as would enable him to reach the public ways in either direction, provided his grantor's title extended thus far. It is not necessary to decide this last point in this case, and it is not decided; but we are clear that, upon the facts of the case, the defendant must be deemed to take, under his deed, to the center of River street on the north. There is no doubt that this would be the extent of his rights if the plat had been properly certified and acknowledged, so as to entitle it to record and operate as a conveyance of the streets to the public. But there is the same reason for applying the estoppel, as against the grantor, where the lots conveyed were bounded on the north by River street "according to the village plat on record," which is referred to in the deed as containing a description of the estate granted.

The cases of *Ely v. Bates*, 5 Wis., 467; *Sanborn v. The C. & N. W. Railway Co.*, 16 Wis., 20; *Weisbrod v. Same*, 18 Wis., 35; *S. C.*, 21 Wis., 602; *Warden v. Blakley*, 32 Wis., 690, illustrate with what liberality this court has applied the doctrine of dedication for public use as a highway in case of recorded plats which purport to show by lines and figures the location and width of streets. See also *Fox v. The Union Sugar Refinery*, 109 Mass., 292.

It is proper to remark that this case differs essentially in its facts from *Van Valkenburgh v. The City of Milwaukee*, 30 Wis., 338; *Emmons v. The Same*, 32 Wis., 433, and *Fleischfresser v. Schmidt*, *supra*. In the two former cases, the contention was that there had been a dedication to the public use by virtue of plats which were introduced in evidence; but this view was not sustained, for reasons stated in the opinions.

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It is unnecessary to dwell upon those cases further than to observe that no streets were marked and designated upon the plats as in the cases before us. The same is true in regard to the strip in controversy in *Fleischfresser v. Schmidt*; the plat did not mark or designate it for a street or alley, and the ruling there made is not in conflict with the views above expressed as to the effect of the conveyance made by Stephen S. Clark to the defendant.

The learned circuit court held that the plaintiff was the owner of all of River street and entitled to the possession thereof. According to our construction of the plat and deed under which the defendant claims, this was incorrect. The defendant took to the center of River street opposite to his lots, and the judgment to that extent must be modified.

By the Court. — The judgment of the circuit court is reversed, and the cause is remanded with directions to enter a judgment in conformity to this opinion.

SENSENBRENNER vs. MATHEWS and another.

December 2 — December 16, 1879.

(1) *Waiver of lien on personal property.* (2) *Condition of recovery in replevin.*

1. A voluntary and unconditional delivery to the owner, of property on which a mechanic's lien has accrued, is a waiver of the lien; and, except in case of fraud and perhaps mistake, such lien cannot be restored by resumption of possession.
2. In replevin, plaintiff recovers on his own right of possession, not on the weakness of defendant's right.

APPEAL from the County Court of *Winnebago County*.

Replevin, for a buggy. The cause was tried by the court without a jury, and the facts found were substantially as follows: Plaintiff, a blacksmith, in the summer of 1875,

owned a building, and occupied a part of the first story as a blacksmith-shop; while another part of that story was occupied by Schweitzer & Co. as a wagon-maker's shop, and the second story over the plaintiff's shop was occupied as a paint-shop by one Maxwell. Schweitzer & Co. were lessees from plaintiff of both their own and Maxwell's shop, and Maxwell was their under-tenant. The usual mode of taking heavy articles into the paint-shop to be painted, and removing them therefrom, was through a trap-door in the floor of the paint-shop, connecting it with the blacksmith-shop; and Maxwell had a right of way through the latter shop for these purposes. The wood-work of the buggy in question was built for Maxwell by Schweitzer & Co., and plaintiff furnished the iron and ironed the buggy for Maxwell, for the agreed price of \$65, of which Maxwell *paid \$34 in painting*, leaving due plaintiff from him \$31. When plaintiff's work upon the buggy was completed, Maxwell, *with his knowledge and consent*, took the buggy from plaintiff's shop to his paint-shop, where it remained, *in Maxwell's possession*, about three weeks. During this time, Maxwell painted and finished it, and *sold it to the defendant Henry*; and at the end of the three weeks, Maxwell commenced removing the buggy from his paint-shop into plaintiff's blacksmith-shop, for the purpose of removing it from the premises; but upon plaintiff's objecting to such removal being made before Maxwell should have "settled up" with him, Maxwell desisted, and the buggy remained in the paint-shop. A few days afterwards, *Henry* procured a writ of replevin for the buggy to be issued from a justice's court against the plaintiff, in the usual form, except that it was made returnable on the second day after its date. *Henry* and Maxwell then *entered the paint-shop peaceably* in the absence of this plaintiff, and *removed the buggy therefrom through the blacksmith-shop to the outside of the building, where Maxwell delivered it to Henry*. Plaintiff returned to his shop before the buggy was removed from the

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premises immediately outside thereof, and forbade its removal, claiming a lien upon it. Thereupon *Mathews*, the officer who had the justice's writ of replevin, and who had accompanied *Henry* and *Maxwell*, served his defective writ upon this plaintiff, but *without Henry's knowledge and contrary to his instructions; the latter being then in the actual possession of the buggy.* *Henry* and *Mathews* then removed the buggy; and the latter made return that he had taken it by virtue of said writ.

Upon these findings, the court held that plaintiff had relinquished his lien upon the buggy, and that *Henry* was the owner and entitled to the possession.

Plaintiff excepted to all those parts of the findings which are italicized in the foregoing statement, and also to the conclusions of law; and he appealed from a judgment rendered in defendants' favor pursuant to the findings.

Elbridge Smith, for the appellant:

The proof is, that the buggy, while in the paint-shop to be painted, was in the possession of and detained by *Sensenbrenner*, to protect his lien. The latter had access to the paint-shop at all times, and the buggy could be removed only through his own shop; and *Maxwell*, by desisting from the attempt to remove it when forbidden by *Sensenbrenner*, recognized the fact that it was under the control of the latter. It is clear that *Maxwell* or his vendee, upon proof of a right to the possession, could have maintained replevin against *Sensenbrenner*. *Henry* also so understood it, and accordingly made his affidavit and took out his writ of replevin; and the officer, *Mathews*, took the buggy upon that writ, and so made return upon the writ. The return of an officer to a writ is in general conclusive evidence of the fact for all the purposes of the suit. *Watkins v. Page*, 2 Wis., 92; *Knowlton v. Ray*, 4 id., 288; *Carr v. Com. Bk.*, 16 id., 50. All the other evidence in the case sustains the return. But the writ was one, on its face, which the justice had no jurisdiction to

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issue; and was no protection to the officer. *Campbell v. Sherman*, 35 Wis., 103.

The cause was submitted for the respondent on the brief of *J. B. Hamilton*. He contended, among other things, 1. That the evidence showed that plaintiff was to receive his pay in work to be performed by Maxwell at some future indefinite time, and therefore could not have a lien. *Bailey v. Adams*, 14 Wend., 203. 2. That if he ever had a lien, he lost it by parting with the possession. *McFarland v. Wheeler*, 26 Wend., 467; *Smith v. Scott*, 31 Wis., 420; *id.*, 432, and cases there cited.

RYAN, C. J. The shops of the appellant, Schweitzer and Maxwell, although in the same building, were held by them respectively in severalty; and the right of way of Maxwell, although passing through the shops of the appellant or Schweitzer, was part of his holding and used by him of his own right.

The buggy belonging to Maxwell was delivered to him through the right of way by the appellant, after it had been ironed by the latter. It was delivered with the expectation that it should be painted by Maxwell; but Maxwell owed no duty, either to Schweitzer or the appellant, to paint it. The delivery was unconditional, and the buggy must be taken to have been delivered to Maxwell in his right as owner of it.

This delivery operated as an absolute waiver of all lien of the appellant for ironing the buggy. The essence of lien, in such cases, is possession. Lien cannot survive possession; and except in case of fraud, and perhaps mistake, such a lien cannot be restored by resumption of possession. "Lien is a right to hold possession of another's property for the satisfaction of some charge attached to it. The essence of the right is possession; and whether that possession be of officers of the law or of the person who claims the right of lien, the chattel on which the lien attaches is equally regarded as in the cus-

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tody of the law. Lien is neither a *jus ad rem* nor a *jus in re*, but a simple right of retainer." 3 Parsons' Cont., 234.

"The voluntary parting with the possession of the goods will amount to a waiver or surrender of a lien; for, as it is a right founded upon possession, it must ordinarily cease when the possession ceases." Story's Ag., § 367.

As this disposes of the lien set up by the appellant to support this action, it is immaterial how the respondents came into possession. In replevin, a plaintiff recovers on his own right of possession, not on the weakness of the defendant's right.

By the Court.—The judgment of the court below is affirmed.

EDWARDS vs. SMITH.

December 2 — December 16, 1879.

Presumption to support judgment.

Where the court directed the jury to find for the plaintiff, and the bill of exceptions is not certified to contain all the evidence, it is presumed that there was evidence conclusively establishing plaintiff's right to recover, even though the evidence preserved in the record has some tendency to disprove such right. *Kollock v. Stevens Point*, 37 Wis., 348, distinguished.

APPEAL from the Circuit Court for *Green Lake County*.

Action to recover damages for the alleged wrongful, fraudulent and forcible taking of a horse by the defendant from the possession of the plaintiff. Answer: *first*, a general denial; *second*, that the defendant purchased the horse of the plaintiff, and that the plaintiff delivered the horse to him pursuant to the contract of purchase.

The jury, by direction of the court, found for the plaintiff, and assessed his damages at \$110; and from a judgment pursuant to the verdict, the defendant appealed. The case is further stated in the opinion.

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For the appellant, there was a brief by *Fish & Thompson*, and oral argument by *Mr. Thompson*.

The cause was submitted for the respondent on the brief of *Waring & Ryan*.

LYON, J. By directing the jury to find for the plaintiff, the court necessarily held that the evidence conclusively established his right to recover.

The bill of exceptions is not certified to contain all of the evidence; and it is firmly settled by repeated adjudications of this court, that, in the absence of such certificate, we cannot review on appeal the rulings of the court below on any mere question of fact.

Error will not be presumed. On the contrary, all reasonable presumptions are in favor of regularity. Hence, without the testimony, and the whole of it, before us, we must presume that it conclusively established the plaintiff's right to recover, and that the court ruled correctly. It is quite immaterial if the testimony preserved in the record tends, or seems to tend, to disprove the plaintiff's right of action. The presumption in that case is that other testimony was given on the trial, which destroys the force of that preserved.

The learned counsel for the defendant does not controvert the general rule above stated, but claims that this case is not within it. His position is that the case is ruled by *Kollock v. Stevens Point*, 37 Wis., 348, wherein the judgment of the circuit court was reversed for error in an instruction to the jury, although a certificate that the bill of exceptions contained all of the testimony was wanting.

In that case the plaintiff sued the city for her services in the care of a person in her house infected with the small-pox, who afterwards died, for services and expenses incurred in the burial of the deceased, and for certain of her goods which were burned, and for the loss of the use of portions of her hotel, because of the infection. She alleged in her complaint

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a special agreement with the proper city officers to render such services. The judge instructed the jury in effect that, in the absence of any special agreement, the city was liable for a portion, at least, of such expense and damage to the plaintiff, including the goods burned. This instruction was held erroneous, and the judgment was accordingly reversed.

The distinction between the two cases is this: In *Kollock v. Stevens Point* the judgment of the circuit court was reversed because the judge gave the jury an erroneous rule of law — a rule which no state of facts would justify; while in this case the instruction or direction to find for the plaintiff involved no proposition of law, but only an assumption of fact, presumably correct as the record stands.

The true rule seems to be, that, if no possible testimony would sustain a material ruling or direction of the court, the judgment will be reversed on the appeal of the party against whom the ruling is made, although the testimony is not preserved. But the judgment will not be reversed because of a ruling which might be upheld by possible testimony, unless the whole of the testimony is preserved in the bill of exceptions, evidenced by the proper certificate. But perhaps this is little or nothing more than a statement of the distinction between a proposition of law and one of fact. The judgment in *Kollock v. Stevens Point* went upon an erroneous proposition of law; while in this case error is assigned upon a proposition of fact, and the record does not furnish the means of determining that it is erroneous.

By the Court. — The judgment of the circuit court is affirmed.

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December 17, 1879 — January 7, 1880.

48	257
80	154
48	257
112	1264

EJECTMENT. (1) *Judgment against tenant not binding on landlord.*HOMESTEAD. (2, 3) *Presumption as to selection of homestead.*

1. The judgment in ejectment against a tenant of the land held not to be binding in a subsequent action of ejectment by the same plaintiff for the same land, against the landlord; and a question determined in the former, not to be *res adjudicata* in the latter.
2. The owner of a legal subdivision of land precisely equal to the statutory measure of a homestead right, whose dwelling-house is situate upon such subdivision, and who has made no different selection, will be held to have selected that subdivision for his homestead, although he also owns adjoining lands from which he might have selected his homestead in part.
3. C., owning 200 acres of land in one body, conveyed the whole to L., his wife not signing the deed. Afterwards, with his wife, he mortgaged the whole 200 acres to K., who purchased the same at the sale on foreclosure of his mortgage. Held, that the deed to L. was inoperative to convey the quarter-quarter section on which C.'s dwelling-house was situate at its date; and that title thereto passed to K. by the foreclosure sale.

APPEAL from the Circuit Court for *Winnebago* County.

Ejectment, commenced September 24, 1875, for the southwest quarter of the southwest quarter of section 10, town 19, range 15, in said county.

On the 12th of June, 1849, George Cown owned and was in possession of the southwest quarter of said section 10, and also of the fractional southeast quarter of the adjoining section 9, the whole containing about two hundred acres of land lying in one body and in one enclosure, and all cultivated alike by him; and with his wife, Sophia Cown, he resided on the land, and had a right of homestead therein. The house in which he lived was on the quarter-quarter section here in dispute, which was not in any way separated from the rest of the farm; and otherwise than by placing his house there he never made any selection of his homestead out of said farm. On the day above

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named, Cown executed a warranty deed (recorded the same day) of the whole two hundred acres to William Lasley, in which deed his wife did not join. In 1852 or 1853, said Cown and wife removed from said lands, and thereafter, until 1860, resided in Shawano county, still farming said lands by his tenants. During the years 1856 to 1860, he resided with his wife in the town of Richmond, in Shawano county, where he voted in each of said years, and where he held the office of chairman of the board of supervisors in 1859, and where he owned in fee simple forty acres of land, which constituted his homestead during all that period. On the 7th of September, 1857, he and his wife mortgaged the 200 acres first above described to one Halstead, to secure payment of his promissory note of the same date for \$3,000; and this mortgage was recorded November 17, 1857. On the 17th of February, 1859, Cown and wife mortgaged the same 200 acres to the plaintiff, *William Kent*, to secure payment for such goods as Cown might thereafter purchase of *Kent*; and this mortgage was afterwards duly foreclosed, but neither the defendants herein nor those through whom they claim, excepting Cown and wife, nor Halstead nor any one holding his mortgage, were made defendants to that suit. At the sale on such foreclosure, plaintiff purchased the whole of the two hundred acres, and the referee's deed of the same to him was duly executed April 3, 1865, and duly recorded on the 17th of August following. On the 10th of August, 1867, an action was commenced by this plaintiff against these defendants to declare the conveyance to William Lasley to be a mortgage, and to have been paid; which action resulted in a judgment March 16, 1869, declaring such conveyance to be an absolute deed. On the 10th of January, 1874, plaintiff declared as his selection of the homestead of said Cown in said 200 acres, the quarter-quarter section here in dispute; and this declaration was duly recorded January 12, 1874, and a copy thereof was served on each of the present defendants a year before the commencement of

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this action. The defendants, excepting *Amable Cown*, are the wife and children and only heirs-at-law of William Lasley.

Upon these facts the court held, 1. That the deed from Cown to Lasley was invalid as to the homestead, and did not acquire validity in that respect by the subsequent acts of Cown in removing from the land and acquiring a homestead elsewhere, before making the *Kent* mortgage. 2. That Cown did not lose his right to select a homestead in said two hundred acres as against the deed to Lasley, by securing another homestead before such selection. 3. That such right of selection did not pass to Halstead by the mortgage to him, but passed to plaintiff as purchaser on foreclosure of his mortgage. 4. That plaintiff is the owner in fee and entitled to the possession of the tract here in dispute. 5. That no demand other than notice of his selection was necessary to entitle plaintiff to maintain this action.

From a judgment for the plaintiff pursuant to these conclusions, the defendants appealed.

Moses Hooper, for appellants, contended, 1. That the clause of the statute restraining alienation of a homestead is a considerable impairment of common-law right, and should be strictly confined to the purpose intended, which is to enable the wife to protect her family in the possession and enjoyment of a homestead after one has been acquired by the husband. *Riehl v. Bingenheimer*, 28 Wis., 84; *Goodell v. Blumer*, 41 id., 436; *Barber v. Dayton*, 28 id., 367; *Wochoska v. Wochoska*, 45 id., 423. 2. That this object would be fully attained by such a construction as validates the deed of one homestead, though lacking the wife's signature, upon the acquisition of another by the husband; and the cases holding this construction are numerous, uniform and respectable. *Stewart v. McKey*, 16 Tex., 56; *Jordan v. Godman*, 19 id., 273; *Allison v. Shilling*, 27 id., 450; *Gee v. Moore*, 14 Cal., 472; *McQuade v. Whaley*, 31 id., 526; *Bowman v. Norton*, 16 id., 213; *Himmelmann v. Schmidt*, 23 id., 117; *Howe v. Adams*, 28 Vt.,

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541; *Davis v. Andrews*, 30 id., 678; *Horn v. Tufts*, 39 N. H., 478; *Hewitt v. Templeton*, 48 Ill., 367; *Vasey v. Board of Trustees*, 59 id., 188; *Black v. Curran*, 14 Wall., 463. 3. The deed to *Lasley*, by all the authorities and by the decision of this court in *Kent v. Agard*, 22 Wis., 150, construing the same, was valid except as against the right of selection by Cown. The latter, at the time of the conveyance to *Kent*, had no right of selection, because he was occupying another homestead in Shawano county. He could not hold one homestead, and at the same time have the right of selecting another; and, having no such right himself, he could convey none to *Kent*. 4. Again, if the mortgage to *Kent* carried the right of selection, what shall be said of the prior mortgage to Halstead? Has he not also the right of selection, and may he not locate this floating right on some other forty acres? It would seem that, before making selection and dispossessing the *Lasleys*, *Kent* ought to subject Halstead's prior right of selection to his will.

Gabe Bouck, for respondent, argued, in substance, 1. That the deed to *Lasley*, without the wife's signature, was not merely voidable, but utterly void, as to the homestead; and the fact that Cown afterward abandoned such homestead, did not change his status as owner, or make valid the void deed. *Williams v. Starr*, 5 Wis., 534; *Phelps v. Rooney*, 9 id., 70; *Hait v. Houle*, 19 id., 472; *Amphlett v. Hibbard*, 29 Mich., 298; *Barnett v. Mendenhall*, 42 Iowa, 296; *Richards v. Greene*, 73 Ill., 54. 2. That as the statute gives the right of selection to the "owner," the claim that Halstead, as first mortgagee, acquired that right, not only conflicts with the doctrine that the legal title rests in the mortgagor until sale on foreclosure, but places the latter and his subsequent grantees or mortgagees completely at the mercy of the first mortgagee, who may select to their injury or even refuse to select at all, and thereby deprive them of the benefit of the statute entirely. 3. That *Kent*, as purchaser at the foreclosure sale,

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became the owner within the meaning of the statute, and acquired thereby the right of selection, and of redeeming from the prior mortgage. *Kent v. Agard*, 22 Wis., 150.

RYAN, C. J. This is the same controversy involved in *Kent v. Agard*, 22 Wis., 150. The plaintiff in that case is plaintiff here; but the defendants are different. There the defendants were tenants of the defendants here. The judgment there is, therefore, not binding here. *Smith v. Pretty*, 22 Wis., 655; *Towle v. Smith*, 27 Wis., 268. And the views on which the judgment rested in that case are not *res adjudicata* in this. The soundness of that decision is therefore as far open to question in this case as if the two cases related to different premises, between different parties.

In *Kent v. Agard*, it was held that, where one owns and lives on more than forty acres of agricultural land, or more than a quarter of an acre in a city or village, although his dwelling-house be upon a legal subdivision of land exactly commensurate with the right of *homestead* given by the statute, the limits of his *homestead* remain undetermined until fixed by his selection. Such now appears to the court an unsound, inconvenient and dangerous construction of the statute.

So far as it bears on the question in this case, the statute in relation to homesteads has remained the same from 1848, when it was first adopted, to the present time. It has relation to a homestead not exceeding forty acres in the country, or a quarter of an acre in a city or village, to be selected by the owner; and the rule in *Kent v. Agard* is, that the homestead right does not attach to any particular land until the selection be made. The right is, however, limited to the land on which the dwelling-house and its appurtenances are situate; and when the dwelling-house, which is the controlling quality of the right, is situate upon a legal subdivision of land precisely equal to the statutory measure of the right, and when the

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owner of it, owning also adjoining land, has made no different selection, he ought to be held to a tacit selection of the legal subdivision on which his dwelling-house stands. Practically this has been the construction of the statute in all or almost all cases except *Kent v. Agard*; and this now appears to the court to be not only an admissible construction of the statute, but better in accord with its spirit and purpose, most convenient, and essential to the certainty of the right of homestead; for, under the construction of *Kent v. Agard*, when one owns in one body more than the legal extent of the right of homestead, and fails to make a selection, he might, in many contingencies, be held to have waived and lost the right itself.

Doubtless, when the owner's estate exceeds the statutory limit, there is a right of selection given by the statute, beyond the limits of the legal subdivision on which the dwelling-house stands. But this right must be held waived by failure to exercise it, except, perhaps, in the particular case expressly provided for in the statute. It might not, perhaps, be a forced construction of the statute to limit the right of selection to that particular case. But this court has uniformly held that the statute should receive a liberal construction in favor of the right of homestead; and it is safer and better to hold the right of selection to be general.

The one case for which the statute expressly provides, is the levy of an execution upon a body of land greater than the right, within which the owner has not selected his homestead. The effect of that provision is not involved in this case, and need not be considered.

The terms of the statute, "to be selected by the owner," apply equally to all homesteads, whether the owner's seizin of land in one body, including the dwelling-house, be greater or less than the statutory limit of the right, or precisely equal to it. And if, by the terms of the statute, selection be necessary to determine the precise limits of the homestead in any case, it is equally necessary in all cases. Though the selection, if

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selection be essential, cannot exceed the statutory limit, it may be less. *People v. Plumsted*, 2 Mich., 465. And if selection be essential, courts cannot recognize the limits of any homestead without it.

This court has, in a great number of cases, recognized the extent of the right, without selection, where the dwelling-house stood upon a legal subdivision of land not exceeding the statutory limit. *Williams v. Starr*, 5 Wis., 534; *Phelps v. Rooney*, 9 Wis., 70; *Dreutzer v. Bell*, 11 Wis., 114; *Green v. Lyndes*, 12 Wis., 404; *Platto v. Cady*, id., 461; *Bull v. Conroe*, 13 Wis., 233; *McCabe v. Mazzuchelli*, id., 478; *Simmons v. Johnson*, 14 Wis., 523; *Bunker v. Locke*, 15 Wis., 635; *Spencer v. Fredendall*, id., 660; *Re Phelan*, 16 Wis., 76; *Casselman v. Packard*, id., 114; *Trustees v. Schell*, 17 Wis., 308; *Jones v. Dow*, 18 Wis., 241; *Borrman v. Schober*, id., 437; *Bennett v. Child*, 19 Wis., 362; *Myers v. Ford*, 22 Wis., 139; *Murphy v. Crouch*, 24 Wis., 365; *Howe v. McGivern*, 25 Wis., 525; *Campbell v. Babcock*, 27 Wis., 512; *Anderson v. Coburn*, id., 558; *Riehl v. Bingenheimer*, 28 Wis., 84; *Hibben v. Soyer*, 33 Wis., 319; *Hanson v. Edgar*, 34 Wis., 653; *Bridge v. Ward*, 35 Wis., 687; *Weisbrod v. Daenicke*, 36 Wis., 73; *Krueger v. Pierce*, 37 Wis., 269; *Massing v. Ames*, id., 645; *Jarvais v. Moe*, 38 Wis., 440; *Watkins v. Blatschinski*, 40 Wis., 347; *Johnson v. Harrison*, 41 Wis., 381; *Goodell v. Blumer*, id., 436; *Wochoska v. Wochoska*, 45 Wis., 423; *Godfrey v. Thornton*, 46 Wis., 677. So where the sheriff levied, and the owner made no selection as provided in the statute. *Herrick v. Graves*, 16 Wis., 157; *Smith v. Omans*, 17 Wis., 395. So, even, where the owner owned adjoining land in excess of the statutory limit, and had made no selection. *Hait v. Houle*, 19 Wis., 472; *Pike v. Miles*, 23 Wis., 164; *Lloyd v. Frank*, 30 Wis., 306 — cases expressly sanctioning the rule now adopted.

The judgment of the court in all these cases is inconsistent with the rule in *Kent v. Agard*. No other case is found to

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support the latter, and *dicta* sanctioning it in very few cases. *Hoyt v. Howe*, 3 Wis., 752; *White v. Polleys*, 20 Wis., 503.

It is quite true that the statute applies the homestead right to the land on which the dwelling-house *and its appurtenances* are situated; and the late Mr. Justice PAINE, in *Kent v. Agard*, illustrates his position by instancing the case of the dwelling-house on one 40-acre lot, and the barns, outhouses, gardens, etc., on another; and he remarks that it was the design of the statute, in such a case, to allow the owner to select any 40 acres, in reasonable shape, that would include the dwelling-house. Of this there can be no doubt; but it was not the intention of the statute to force the owner to make such selection. The right rests primarily on the dwelling-house, not on its appurtenances; and if the owner fail to make the statutory selection, so as to include the appurtenances of the dwelling-house, he must be held to limit his homestead to the legal subdivision, corresponding with the statutory limit, on which his dwelling-house stands. It is his business to make the selection, when he considers it necessary to his right; and it is not the business of courts to make it for him, or to force him to make it, or to aid his defect of right arising by his own laches.

It is held in *Kent v. Agard* that the husband's conveyance, without the signature of the wife, is invalid to the extent of the unselected homestead; that is to say, is valid as to an uncertain part of the grant, and invalid as to another uncertain part; and that the husband's conveyance, with the wife's signature, operative to convey the unselected homestead, vests in the grantee the right of selection, after the right itself of the grantor has ceased. Such a rule appears to work a solecism in the law of conveyancing, making valid grants without certainty of the thing granted, and to be productive of great and needless confusion. The rule adopted on the present appeal appears to avoid all this, and to rest more securely on well-settled principles. The result to the parties here is precisely

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the same as if the court had followed the rule of *Kent v. Agard*; and the court, the profession and the public gain a certain and uniform rule, already sanctioned by so great a number of adjudications. The truth is that *Kent v. Agard* is an exceptional case, not resting on sound principle, and ought to be overruled, as it is, for the sake of uniformity of decision.

The dwelling-house of Cown, the common grantor of the parties, stood on the 40-acre lot for which this action is brought; and, in the absence of other selection, constituted his homestead when his conveyances were executed. The respondent claims under a conveyance executed by Cown and his wife; the appellants under a conveyance executed by Cown only, without the signature of his wife. The conveyance under which the appellants claim, without the wife's signature, was inoperative to convey the homestead; and the respondent's title to the lot on which Cown's dwelling-house stood must therefore prevail.

By the Court.—The judgment of the court below is affirmed.

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September 25, 1879 — February 3, 1880.

HIGHWAY: COURT AND JURY: EVIDENCE. (1) *Liability of lot-owner under city charter for condition of sidewalk.* (2) *Questions of knowledge or notice for the jury.* (3) *Proof of change in condition of sidewalk before a view by the jury.*

1. A city charter requires each lot-owner to keep his sidewalk "in a good and safe condition for use," and provides that for injuries occurring to any person "by reason of a defective sidewalk," the lot-owner shall be liable. *Held*, that such liability attaches for injuries resulting from a smooth and slippery condition of the walk, rendering it unsafe, whether such condition result from the wearing of the surface by use, or from slippery substances placed thereon with the lot-owner's consent, or suffered to remain through his neglect.

48	265
81	228

48	265
56	768

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2. As to a slippery and unsafe condition of defendants' sidewalk, resulting from paint placed thereon by other persons, there was no error in submitting to the jury the question whether defendants knew of it, or, in view of the nature of the defect and the length of its continuance, were chargeable with notice.
3. Where the jury had viewed the walk whose defective condition is alleged to have caused the injury, there was no error in admitting evidence that changes had been made in its condition after the accident and before the view.

APPEAL from the Circuit Court for *Rock* County.

Action for injuries to the plaintiff resulting from the unsafe condition of a sidewalk in the city of Janesville. The owners of the lot upon which the walk is constructed, were made defendants together with the city; and from a judgment, upon verdict, in favor of the plaintiff, said lot-owners appealed. The case is stated in the opinion.

For the appellants, there was a brief by *Cassoday & Carpenter*, and oral argument by *Mr. Cassoday*.

For the respondent, there was a brief by *Bennett & Sale*, and oral argument by *Mr. Bennett*.

COLE, J. The charter of the city of Janesville imposes upon the owner of a lot fronting on any street in the city the duty of keeping the sidewalk in front of his lot in a good and safe condition for use; and in case an injury shall occur to any person by reason of a defective sidewalk, the owner is made liable for the damages thus sustained. Section 9, ch. 298, P. & L. Laws of 1869. This action is brought upon this provision of the charter. The gravamen of the complaint is, that the defendants laid a sidewalk of limestone along Main street in front of their building and lot, which walk, at the time the plaintiff was injured, had by use become smooth and unsafe to walk on; and that, with the knowledge of the defendants, some person had covered a part of the sidewalk at this point with red paint, mixed with oil or other liquid, thereby negligently and unlawfully adding to the insecurity

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of the walk, and rendering the same unsafe and dangerous to walk on by reason of its slippery condition.

There was evidence given on the trial which tended to sustain this cause of action. A great number of exceptions were taken to the rulings of the court below, which cannot be conveniently noticed in detail. The principal questions in the case arise on exceptions to the charge of the court as given, and to the refusal of the court to give the instructions asked on the part of the defendants. The charge is quite lengthy, and seems to cover every possible aspect of the case.

The learned circuit judge, among other things, charged in effect, that the law cast upon the defendants the duty and obligation of keeping the sidewalk in front of their building in a reasonably good and safe condition for public use; and that if the plaintiff was injured, while passing over the walk with due care, by reason of its being dangerous, they were liable for the damages sustained. The circuit judge further told the jury that the defendants were under no obligation to keep the sidewalk in such extraordinary and unusually good and safe condition as to render an accident to one traveling upon it impossible, but were simply bound to keep it in an ordinarily and reasonably good, safe and suitable condition for public use; and that the jury were to determine from their own view of the premises, and from the testimony in the case, whether this was the condition of the walk. In respect to the particular defect in the walk complained of, namely, great smoothness and slipperiness of surface, the court said: "If this walk, by use, had become so smooth and slippery as to be dangerous and not safe for public use; or if, by being painted, it was made so smooth and slippery as to be dangerous and not safe for such use — such condition was one against which the defendants were bound to provide."

Now it is insisted by the learned counsel for the defendants, that the propositions embraced in this charge are not law. The contention is, that the words "defective" and "defect,"

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as used in the charter, clearly imply that there can be no liability unless there be something wanting, something omitted, some imperfection or defect in the nature or quality of the material of which the walk is constructed, or some defect in the manner of making the walk; and that the language does not refer to smoothness of the walk arising from use, or to something which happens to be upon the walk without the knowledge or consent of the owner of the lot.

We do not think this construction of the charter is correct. A walk, within the meaning of the charter, may be defective because of imperfection or fault in the materials of which it is made; or from defect or fault in constructing it; or it may become defective and dangerous from use, or in consequence of things placed upon it. Suppose that a walk, originally constructed of good materials and in a proper manner, decays or wears out by use so as to be dangerous and unsafe: is it not clear that a walk in such a condition is defective? That it may become defective, or, more properly speaking, may become unsafe, by reason of things placed upon it, would seem to be a proposition too plain for argument. If, upon a walk constructed properly and with good materials, some slippery foreign substance, like paint or grease, is placed, which renders the walk slippery and dangerous to travelers upon it, it would be idle to say that such a walk was in a "good and safe condition for use;" and where the slippery foreign substance is placed upon the walk with the consent of the owner of the lot, or is suffered to remain upon the walk through the owner's neglect to remove it when notified of its existence, in these cases the owner's responsibility would seem to be clear, to a person injured in consequence of this slippery substance; but at first blush there would seem to be less ground for holding the lot-owner liable where the injury occurred by reason of the walk becoming smooth and slippery by public use. Still the owner is under a legal obligation to keep the walk in front of his lot in "good and safe condition for use." This

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is the measure of responsibility imposed by the charter; and therefore, whether the walk becomes unsafe and dangerous by reason of being made smooth and slippery by public use, or from some other cause, as the decay or wearing out of the material of which it is constructed, still the defect is one coming within the provision of the charter, and for which the lot-owner is liable to an injured party.

It is apparent that slipperiness caused by use is a defect which care and diligence on the part of the lot-owner can remedy or guard against. It is not like slipperiness caused by ice or the action of the elements, which no degree of diligence can prevent. We therefore hold that there was no error in the above charge as given.

Again, the court charged that "in respect to the liability of the defendants in another regard, it depends upon this: If you find that this walk was in a bad and unsafe condition, by the paint placed upon it, or by having been worn down smooth by use, you must find either that they had actual notice of this condition, or you must find further that the defects complained of were of such a nature and had existed for such a length of time as that they must have known, or were bound to know, that it was in this condition. Their liability depends upon that—not that they must of necessity actually have known that it was in this condition; but they must have actually known, or you must find that the defects complained of were of such a nature and had existed for such a length of time that, considering the residence of the defendants, the fact of the location of the premises, and their familiarity with them, they must necessarily be chargeable with notice of their actual condition." This charge, as bearing on the question of notice to the defendants of the existence of paint on the walk or its smoothness by use, would seem to be unexceptionable. For if the defect in the walk—if any defect there was—had existed for a considerable time, then, under the circumstances, the defendants would be presumed to have had

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notice of it. The walk was along one of the principal streets of the city, and the nature of the defect was well calculated to arrest the attention of every person passing over it.

The question whether the walk was in fact dangerous or defective, within the rule laid down by the court in the charge, as well as the question of contributory negligence, seems to have been fairly submitted to the decision of the jury.

The above remarks, we think, dispose of all the material questions arising upon the charge as given, and the refusal of the court to give the instructions asked. Consequently nothing further will be said on these points.

While the witness Frank Parker was being examined by plaintiff's counsel, he was permitted to testify, under objection by the defendants, that he saw Charles Riley pick holes in the walk, where it was painted, after the accident. The admission of this testimony is assigned for error. The testimony was admissible under the circumstances. As we understand the case, there was a view of the walk by the jury. The testimony in question was proper and competent to show that the surface of the walk had been changed after the accident and before the jury saw it. In the absence of this testimony the jury might have been misled as to the real condition of the walk when the injury occurred. In any view we have been able to take of the case, we think the judgment is correct, and must be affirmed.

By the Court. — Judgment affirmed.

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MACK VS. THE STATE.

November 12, 1879 — February 3, 1880.

48	271
78	190
48	271
88	406
48	271
100	307

CRIMINAL LAW AND PRACTICE: EVIDENCE: COURT AND JURY. (1) *Refusal of defendant's testimony as to conversations, after admitting that against her.* (2) *When words spoken admissible as parts of the res gestæ.* (3) *Defendant's right to show facts to repel unfavorable inferences arising from other facts shown by the state.* (4) *Admission, in prosecution for murder, of defendant's testimony before coroner's jury.* (5) *Credibility of witness; court and jury.*

1. Where, on trial of an information for murder, acts and conversations between the accused and the deceased, which occurred a short time before the death, were admitted in evidence on behalf of the state, and were both material as tending to show the state of mind of the accused toward the deceased, it was error to reject evidence for the defense as to the same conversations; and, the accused being, by the law of this state, a competent witness in her own behalf, it was error to reject *her* testimony as to such conversations; and the fact that there was *other* testimony by and for the accused to the point that after such acts and conversations the parties had been reconciled and their relations were apparently pleasant, does not relieve the error.
2. When the acts of a party are admissible in evidence, what was *said* at the time of doing the acts, being a part of the transaction, explaining and characterizing it, and deriving credit from it, is also admissible as part of the *res gestæ*; and under the circumstances of this case (for which see the opinion), after the state had properly put in evidence the *acts* of the parties a short time before the death, the defense would have been entitled to show the conversation between them occurring at the same time, even if the state had not introduced evidence of such conversation.
3. The state introduced evidence to show (as a motive for the murder) that the accused, being the wife of the deceased, had a criminal intimacy with one X, who was in the employ of the deceased; and such evidence tended to show that X had been discharged by the deceased, and, after being reemployed, had again been discharged by him after one day's service. *Held*, that it was error to reject evidence for the defense to show why X left such employment, offered to repel the inferences unfavorable to the accused sought to be derived from the state's evidence.
4. There was no error in permitting the state to put in evidence the testimony of the accused, given at the coroner's inquest, before the arrest.

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5. The *credibility* of a witness is a question for the jury, under proper instructions and cautions from the court, notwithstanding he may have made contradictory statements under oath, or be an accomplice of the accused.

ERROR to the Circuit Court for *Rock County*.

For the plaintiff in error, there was a brief by *Winans & McElroy*, her attorneys, with *Ogden H. Fethers*, of counsel, and oral argument by *Mr. Winans* and *Mr. Fethers*.

For the state, there was a brief by *Alex. Wilson*, the Attorney General, and oral argument by *H. W. Chynoweth*, Assistant Attorney General.

TAYLOR, J. The plaintiff in error was tried in the circuit court for Rock county upon an information for the murder of her husband, convicted of murder in the first degree, and judgment entered against her that she be imprisoned for life in the state prison. A bill of exceptions was regularly settled and filed in said court, and a writ of error issued, bringing the record to this court for a review of the exceptions taken on the trial by the plaintiff in error. The exceptions taken, and upon which she relies in this court for a reversal of the judgment against her, are mainly exceptions to the introduction of evidence against her, and to the rejection of evidence, offered by her.

The record shows, with such a degree of certainty that it is hardly controverted by the plaintiff in error, that on the night of the 13th day of July, 1878, at his residence in the town of Turtle, in Rock county, the husband of the plaintiff in error was murdered; and that early in the morning of the 14th of July his dead body was found by his hired boy in the horse stable in his barn, lying behind one of the horses. There was a large wound upon the side of his head, cutting through the scalp, but not apparently fracturing the skull; and subsequent examination showed that he had received fatal injuries about the chest, and several of the ribs were fractured.

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The evidence also shows that she was living with him in the same house at the time of his death, but that she had not slept in the same room or bed with him for a considerable time before his death. The only other persons at the deceased's house on the night of his death were a boy, Joseph Watsic, who was about nineteen years old; a man, Frank Dickerson, about twenty-three years old, who was charged with assisting in the murder; and Ettie Mack, aged fourteen years, Bernice, aged six years, and Beatrice, aged three years, children of the deceased and the accused.

On the night of the murder, Joseph Watsic slept up stairs, in the same room, but not in the same bed, with the man Dickerson. All the children slept up stairs. The deceased slept below, and the accused was accustomed to sleep below, but swears that on this night she slept up stairs with her oldest daughter. The youngest child had slept with the deceased, but on this night she had been put to bed up stairs, as the accused said, because it was warm and she thought the child might disturb her husband.

It appears that Watsic and the children heard no noise or disturbance of any kind about the house during the night; that the accused called Watsic to get up about sunrise on Sunday morning, which was earlier than he was accustomed to rise; that when he got up Dickerson requested him to go to the barn and feed the horses, though Dickerson usually fed and took care of them; and that Watsic got up and went to the barn, and found the dead body of the deceased in the stable behind one of the horses.

The evidence further showed that the deceased was jealous of Dickerson, and suspected him of having improper intercourse with his wife; that on the night previous to the murder he and the accused had had a quarrel about midnight, during which she had struck him with considerable violence on the head with a heavy pitcher; that after she struck him over the head he went out of the house to the barn, and she

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followed him out; and that Frank Dickerson saw them when they came out of the house on that night, and claims to have heard what was said between the deceased and his wife on that occasion.

The accused denies all knowledge of how the deceased came to his death, and says she did not awake after she went to bed that night until the morning, and heard no disturbance or noise of any kind about the house.

The evidence also shows that not long before this the deceased had purchased a pistol and brought it to the house, and that the accused had got it in her possession and hid it from him; and that is alleged to have been the cause of the quarrel on Friday night.

Dickerson swore, on the trial, that there had been illicit intercourse between himself and the accused frequently while he was in the employ of the deceased; that the deceased had discharged him, and that he was reemployed at the solicitation of the accused; that on the night of the murder the accused came to the door of the room where he slept, but said nothing at first; that about an hour after, she came up stairs to the door again, and then he heard the deceased open his door down stairs and come up; that she had the revolver in her hand; that she turned and followed deceased down stairs, and said, "Frank, come down stairs;" that he then got up and went down stairs, and as he stepped from the dining room to the kitchen door they were talking pretty loudly, and the accused took a club from the wood-box and struck the deceased on the side of his head, and he fell and did not move; that at the instigation of the accused he helped her carry the body to the barn, and placed it behind the horse, where it was found in the morning; that the accused took the horse by the head and backed her up in order to make her step on the body. He details with great particularity what conversations took place between them; that she made him take off his shirt, which had some blood on it, and that they took some cloths which

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had been wrapped around the head of deceased when they carried him to the barn, and were bloody, and hid them under the privy; and that it was arranged that she should call Watsic in the morning, and that he should tell Watsic to go out and feed the horses, so that he might discover the dead body. When first asked by one of the neighbors, who had assembled there on Sunday morning, how he was killed, she said that "the horse killed him; she found him behind the horse."

The record also shows that Dickerson had at first, when before the coroner, denied all knowledge of how the death occurred, and denied all criminal intercourse with the accused; and that he boldly admitted on the trial that he had sworn falsely on these occasions.

I have made this brief statement of some of the principal things connected with the murder, as sworn to by the witnesses, not for the purpose of conveying the idea that it is a summary of the evidence given on the trial — the trial occupied several weeks, and the whole testimony, as taken by the reporter, covers over 2,000 written pages, — but for the purpose of showing the materiality of some of the evidence which was offered by the accused and ruled out by the court.

It will be seen, from the foregoing statement, that the only witness who gives any direct evidence of the killing of the deceased by the accused, is the witness Dickerson; and it is evident, from the statement, that his connection with the murder is such as to render his evidence subject to very great suspicion, and that his former contradictory statements as to the most material facts, under oath, so impeached his credibility that the jury would have been justified in disbelieving his testimony, unless corroborated by the other evidence in the case. The conviction, if sustained, must be sustained mainly upon the circumstantial evidence produced against her; and it is this view of the case which has compelled us to the conclusion that the court erred in excluding evidence which might have explained some of the strongest

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points which the circumstantial evidence makes against the accused.

In the absence of satisfactory direct evidence of the commission of the crime by the accused, it was necessary for the state to strengthen the circumstantial proofs of facts existing at the time of the murder, tending in some degree to fasten the guilt upon her, by showing, if possible, some adequate impelling motive which might induce her to commit the murder. This the state undertook to do, first, by showing that the affectionate and kindly feelings which ordinarily exist between husband and wife, had long since ceased to exist between the deceased and the accused; that in place thereof the accused had come to look upon her husband with feelings of hatred and contempt, and the husband was filled with jealousy, and possibly harbored thoughts of revenge, and the peace and harmony which should surround the home had given place to disgraceful quarrels, resulting in personal violence. Having shown that the affectionate relations of husband and wife no longer existed, the state then undertook to show that the accused, impelled by her passions, had violated her marital vows, and carried on an adulterous intercourse with the man Dickerson in the house of her husband. By this evidence the state laid the foundation for the argument that the hatred of her husband and her unhallowed desire for her paramour would be an irresistible motive impelling her to remove, by the terrible crime of murder, the object of her hatred, and thus open the way to the full gratification of her lustful passion for Dickerson.

Every part of the evidence, therefore, which tended to show her hostility towards her husband or her passion for Dickerson, became most material in the case.

The evidence of the transaction about midnight on the Friday night before the murder, in which, it is admitted, the accused struck the deceased a violent blow upon the head with a heavy pitcher, was peculiarly pertinent in showing the feel-

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ing of enmity existing on her part at the time. And it is in connection with the evidence given and the evidence offered in regard to this transaction, that we think the learned circuit judge committed an error which may have prejudiced the accused, and which this court cannot overlook. The record shows that the witness Dickerson had testified, on the part of the state, that he saw a part of this transaction, and was permitted to testify to the conversation which he heard between the deceased and the accused at the time.

Afterwards, when the accused was called as a witness in her own defense, her counsel offered to show her version of the conversation at that time; and, upon the objection of the district attorney, the court excluded it, and the defendant duly excepted. We are unable to understand upon what rule of law this offer was excluded. The state considered the conversation material, and there can be no doubt of its materiality. If the conversation showed that the accused accompanied her acts of personal violence with language which indicated a wicked intent and a state of mind which would be likely to impel her to other acts of violence, or if the acts of violence were accompanied with threats of future violence, there can be no doubt of its competency on the part of the state as against her. The evidence being clearly competent, and having been introduced by the state, it would seem to be equally clear that the accused should have been permitted to prove the same conversation by any other witness who was present and heard the same. She would not be concluded by the version of it given by the witness Dickerson. She looked upon him as prejudiced, and claimed that he had not given a true version thereof. The law having made her a witness in her own behalf, she was as competent to testify upon the subject as any other person who might have been present and heard the same. It is unnecessary to cite authorities to show that when one party has given a conversation in evidence, or a part thereof, which is material in the case, the other has the right

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to give his version of the same conversation by other witnesses who were present and heard it.

The offer on the part of the defendant in relation to this matter was as follows: Counsel for the accused said, "I desire to show what was said between the parties when he went out of the house on that Friday evening, and she followed him; after they returned, what was said; and all that was said as to that matter during that night."

To this offer the learned circuit judge made the following remark: "It being twenty-four hours before the death of Mack, and as after this the matter was arranged, compromised between them, so that they were good friends, I don't think it is proper at all to open the subject by showing what was said between the parties this Friday night."

Counsel for the defendant then answered: "If the fact is that they both agreed to bury their domestic difficulties on that Friday night, and hide them from the public gaze, and make up from that time until the time of his death, and everything was pleasant between the parties, it seems to me that in that view it is competent."

The court replied: "You have the direct testimony of the witness already that those matters were fully adjusted between them, and you have the testimony of the daughter to the effect that, on Saturday following the Friday night, their relations were extremely pleasant. The bearing and conduct of each to the other was so. It stands, as I understand, as domestic discord, to be treated on either side as the circumstances under which it occurred seems to suggest that it would be proper on each side."

In the testimony given by Dickerson in regard to the transaction, he swears as follows: "It was about 12 o'clock at night; . . . as I was going out again to the barn to call Joe Watsic, I heard Mack come through into the kitchen, and heard *Mrs. Mack* say, 'Do you see that?' and Mack replied, 'Yes; keep it if you want to.' When Mack came

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around the corner of the house, *Mrs. Mack* came around the corner, and was looking towards the kitchen door that Mack came out of; and I thought I heard her cocking a revolver, and he (Mack) said, 'Shoot me, will you, you d—m b—h,' and started and ran towards the barn; and *Mrs. Mack* said, 'Run, you coward,' or something like that. *Mrs. Mack* came out to the barn and said, 'George, come here.' He said, 'What do you want?' She asked him 'what he was afraid of—I am not going to touch you.' Mack said, 'The boys are come;' and she said, 'Let us make up.' He says, 'The boys are coming—we had better go into the house;' and I saw *Mrs. Mack* go towards the house, and did not see where Mack went to."

This is all the evidence which was given as to what was said by the parties at the time. The court, however, permitted full evidence to be given as to what was done by the respective parties, but excluded all further evidence as to what was said by them during the transaction and relating to the same. This evidence did not show any reconciliation of the parties; and, although the court permitted the accused to state what was done, and to make a general statement that they had made up and become reconciled after this violent and disgraceful scene, we think the accused had the right to lay before the jury what was said by the parties, from which she drew the conclusion that a reconciliation had taken place. If she had been permitted to detail all that was said, the jury might have come to the conclusion that her general statement that they had made up, and that the angry passions arising out of this disgraceful personal conflict had passed away and given place to kinder feelings, was a truthful one; but without such detail they may have disbelieved her general conclusion altogether.

The state having opened the door to admit what was said by the parties on this occasion, for the purpose of prejudicing the cause of the accused, the court could not justly close

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it against a full and complete statement of all the details of the conversation attending it. If she admitted herself in fault, and sought forgiveness and reconciliation, she was entitled to lay before the jury what she said as well as what she did, so that they might judge from her words, as well as from her acts, whether she regretted and repented of what had been done. It was not for the court to say that, as the evidence of what was done was before the jury, and a general statement as to the conclusion which resulted from their conversation, it was of no importance to the accused to show all the details of what was said, either for the purpose of giving character to what was done, or of convincing the jury that her statement of the conclusion which was reached was a truthful statement.

We think that the learned circuit judge erred in holding as a rule, in the trial of this case, that although acts done might be given in evidence when such acts tended to prove any material issue in the case, yet what was said at the time by the person doing the acts must be excluded. After a careful examination of the authorities we think they are almost uniform in holding, that when the act of a person may be given in evidence and is pertinent proof, what was said at the time of the doing of the act may also be given in evidence as a part of the *res gestæ*; it becomes a part of the act itself, is explanatory of it, and gives it, to a great extent, its character.

The fact that the acts given in evidence occurred previous to the time when the murder was committed, can make no difference as to the rule. If the acts of the accused done before the commission of the crime with which she is charged are competent evidence tending to show that she committed such crime, then what was said at the time the act was done is also admissible, as explanatory of the same, and as indicative of the intent or object of the act. The reason for this rule is very forcibly stated by the court in *Wiggin v. Plumer*, 11 Foster (N. H.), 251-267: "Where evidence of an act done by a party is admissible, his declarations made at the time having

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a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*.' And the rule is substantially stated in the same way in *Gordon v. Shurtleff*, 8 N. H., 260; *Plumer v. French*, 2 Foster, 454; and *Hersom v. Henderson*, 3 Foster, 498.

"When a fact is offered in evidence, the whole transaction, if it consists of many particulars, may and ought to be proved. Every additional circumstance proved may vary the effect of the evidence — may neutralize it or give it point. What is then said by the parties, and what is said by others to them, relative to the subject of the transaction, is a part of the transaction itself. It is admissible on the same principle that every other part of it is, that the whole matter may be seen by the jury — upon the same principle which disallows extracts of written papers, that their effect may be materially varied by the part omitted. Contemporaneous but otherwise unconnected conversation is rejected on the same ground as other unconnected facts. If the statement offered in evidence does not tend to elucidate or give character to the acts proved, it is to be rejected. If it is upon the same subject and relative to the act in proof, it should be received."

The case of *Wiggin v. Plumer*, *supra*, was referred to by the late learned Justice Paine in the case of *Ranger v. Goodrich*, 17 Wis., 78-85, and approved as stating the true rule in cases of this kind. The same rule is stated by the court in *Lund v. Tyngsborough*, 9 Cush., 36-41, as follows:

"If a declaration has its force by itself as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. Such a declaration would be mere hearsay. As when the holder of a check went into a bank, and when he came out said he had demanded its payment; this declaration was held inadmissible to prove a demand, as being no part of the *res gestæ*. This statement was a mere

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narrative, wholly detached from the act of demanding payment, which was the fact to be proved. But where the act of a party may be given in evidence, his declaration made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act, or fact, gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay.

“Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. . . . Perhaps the most common and largest class of cases in which declarations are admissible, is that in which the state of mind, or motive, with which any particular act is done, is the subject of inquiry. Thus, where the question is as to the motives of a debtor in leaving his house and going and remaining abroad, so as to determine whether or not an act of bankruptcy has been committed, his declarations when leaving his house and while remaining abroad are admissible in evidence. Such declarations accompanying the act belong to the *res gestæ*. They are calculated to elucidate and explain the act, and they derive a degree of credit from the act.”

This court, in the case of *Bates v. Ableman*, 13 Wis., 644-650, admits the justice of the rule as stated in the latter part of the above quotation, in the following language: “It is undoubtedly true that where the intent of a party to a sale is in issue, his statements at the time, and so connected with the transaction as to be a part of the *res gestæ*, are competent evidence to show such intent, even though the person is not a party to the suit.” In the case of *Sorenson v. Dundas*, 42 Wis., 642, the rule is stated very briefly: “Declarations are

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verbal parts of the *res gestæ* only when they are contemporaneous. The respondent's narrative after the occurrence belonged no more to the *res gestæ* than his evidence on the trial." *Felt v. Amidon*, 43 Wis., 467.

In *Hamilton v. State*, 36 Ind., 280, it is said: "It is well established by the authorities, that in all cases, civil or criminal, where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate, explain or give character to the act, are admissible. They are a part of the transaction, and for that reason are admissible, and it makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of or against the party making it. If the act was one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as when the tendency is to show the criminality of the act; and it may be given in evidence by the defendant as well as by the state." See also, upon this subject, *Parsons v. State*, 43 Ga., 197; *Comfort v. People*, 54 Ill., 404; *Head v. State*, 44 Miss., 731; *McKee v. People*, 36 N. Y., 113; *Russell v. Frisbie*, 19 Conn., 206.

Within the rule of these decisions as to what conversations may be given in evidence as a part of the *res gestæ*, the accused had, as we think, the right to give the jury the conversation which took place between herself and her husband on the Friday evening during the continuance of the transactions which were given in evidence against her, even though the state had not given any part of such conversation in evidence on its part. She had the right to have the whole transaction laid before them, including the conversation; and it was error to restrict her to a bare statement of what was done. The conversation, if detailed to the jury, might or might not have benefited her case. Of that she had the right to judge, and neither the judge of the court below nor the judges of this court can say that she would not have been benefited by a full disclosure of all that was said at the time.

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This rule of permitting acts to be given in evidence and excluding all conversations and statements which accompanied the doing of such acts, was carried through the entire trial. The authorities clearly show that such rule was erroneous.

An instance of the prejudicial operation of this rule against the accused will be found in that part of the evidence offered by the state tending to show that she had formed a violent passion for Dickerson, and that she desired to retain him in the employ of her husband for the purpose of gratifying such passion. The state had shown that, on the Friday night before the murder and before the trouble at midnight, there had been some other trouble between the accused and the deceased, and Dickerson then told her he was going to leave, and she replied that "if he did, she would go to the old well," and that she started towards the well. The oldest daughter also testified that her mother did go towards the old well, and that she saw her mother crying as she went; that she followed her to the well, and her father came there soon after.

The counsel for the accused asked the court whether he could ask the daughter what her mother said to her when she came up to her on her way to the old well. The court refused to permit the question to be asked, and exception was duly taken. The inference the state sought to draw from this evidence was, that the accused was so completely under the control of her passion for adulterous intercourse with Dickerson, that she seriously meditated suicide in case he left her, or else that she made the threat with the purpose of inducing him to remain. It was only in this view of the case that the evidence was material, and in this view it was very damaging evidence against the accused; yet the court refused to let her, through her witnesses, give in evidence her declaration, made in the very act of going to the well, as to her purpose in going there. The evidence, we think, was clearly competent. If the act of going to the well was competent, her statement at the time as to why she was going, made while going, should

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have been admitted. The jury are to say whether they would believe the statement, made at the time to the daughter, or whether they would give credit to the statement made by the discredited witness, Dickerson.

If the witness had been allowed to give the statement of the accused, made at the time, it might have satisfied the jury that the weeping of the accused was not occasioned by her grief at the anticipated desertion of her alleged paramour, and that her going to the well was for an entirely innocent purpose; and might have repelled the inference that she was willing to commit suicide rather than be parted from him.

The rule of excluding what was said at the time acts were done, and yet permitting the acts themselves to be proved, being clearly erroneous, it necessarily led to the exclusion of evidence which might have had weight with the jury, and have impressed them in her favor; and for this reason we feel compelled to reverse the judgment and direct a new trial.

There was another exception taken by the accused, which we think was well taken. Evidence was given that Dickerson had been discharged by the deceased; and that he was re-employed, but left again after one day's service. This evidence was given by the state as a circumstance tending to show that the deceased discharged him the second time for the reason that he had discovered improper intercourse between him and his wife. The accused offered to show why Dickerson left at this time, and the evidence was rejected. We are clearly of the opinion that, within the rule before stated, the evidence was competent. It seems to us very clear, that if the fact that he left the employment of the deceased was material evidence for the state, the accused had the right to show the reason of his leaving. If the evidence had been admitted, it might have appeared that his leaving had no relation to his supposed improper intimacy with the accused.

The objection to the introduction in evidence of what the accused said as a witness under oath before the coroner, is

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fully answered in the opinion filed in the case of *Dickerson v. The State*, and the answer need not be repeated here.

We are not prepared to say that the court committed any error in refusing to give the instructions asked by the learned counsel for the accused as to the credit which the jury should give to the evidence of the witness Dickerson, either on account of his contradictory statements made under oath, or on account of his alleged participation in the murder as an accomplice of the accused. We think the tendency of the recent opinions of the most learned courts is to leave this subject of the credibility of the witness to the jury, under proper instructions and cautions from the court, notwithstanding he may have made contradictory statements under oath, or be an accomplice of the accused. The reasons for holding to this rule would be as potent in this state as in any other, since the legislature has seen fit to declare that even a man convicted of perjury shall be a competent witness, leaving his credibility to the jury under all the circumstances of the case.

The old rule, "*falsus in uno, falsus in omnibus*," was apparently founded upon the other rule, that the person who had been indicted and convicted of willful perjury was not a competent witness in any case; and the courts, in analogy to this rule, were inclined to hold that when it appeared in the course of the trial that a witness had been guilty of perjury, his testimony ought to be excluded in the same manner as though he had been indicted and convicted of such perjury. The rule that the person convicted of perjury is not a competent witness, having been abolished by the statute, and his competency restored, his credibility is necessarily a question for the jury; and it would seem to follow that the witness who may have made false statements under oath, of which he had not been formally convicted, would not become thereby an incompetent witness for all purposes, any more than the witness who had been convicted of perjury, and his credibility must also be left to the jury, under all the circumstances connected with his testimony.

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From an examination of the record in this case, we are strongly impressed with the idea that the learned attorney for the state was unnecessarily technical in his objections to the introduction of evidence, and that the court adopted too rigorous a rule upon that subject. Though it be true that the judge, upon the trial of a criminal case, should not permit the time of the court to be wasted in hearing evidence which is entirely disconnected with and immaterial to the real issues, and which may mislead and confuse the jury, yet, on the other hand, for the furtherance of justice and the protection of the state, a liberal rule should be adopted in the admission of evidence, and no evidence offered by the accused should be rejected when its immateriality is not clearly apparent. The evil of admitting evidence in a criminal action which may, upon a more mature examination than it is possible to give to it upon the trial before the jury, be held irrelevant and immaterial, is comparatively slight when contrasted with the evil result which must follow the rejection of such evidence if upon more mature consideration it be seen that the evidence was material and should have been admitted.

The admission of such evidence, if in fact immaterial, will not be very likely to prejudice the state with an intelligent jury; whereas its rejection, if, upon more deliberation, it is seen to be in fact material, may, as in this case, work a reversal of the conviction, and involve the delay and expense of a retrial, without any possible benefit to the state, and impose the expense and all the harrowing anxieties of a second trial upon the accused, with slight chance of procuring a more favorable result than was reached on the first. It seems to us that in every aspect of the case it is better for the state, as well as for the accused, that the trial court should adopt a liberal course in the receipt of evidence offered by the defense; and that, if the court errs, it should err in liberality rather than in the application of technical and rigorous rules, excluding all evidence which is not clearly seen to be material.

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On account of the errors above stated, in the rejection of evidence offered by the accused, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the Court.—So ordered.

DICKERSON VS. THE STATE.

November 13, 1879—February 3, 1880.

CRIMINAL LAW AND PRACTICE: EVIDENCE: INSTRUCTIONS: NEW TRIAL.

(1) Admission of defendant's testimony on examination of another person charged with same crime. (2) An instruction construed. (3) An instruction held not injurious to defendant. (4) Refusal of new trial sustained, on the evidence.

1. Upon an information charging the accused, in separate counts, with murder, and with being an accessory thereto, there was no error in admitting in evidence against him testimony given by him as a witness for the state, while under arrest upon suspicion of having committed said crimes, upon the examination of another person accused of the same murder; there being no reason for believing that such testimony was not entirely voluntary.
2. The court instructed the jury as follows, in reference to the accused: "By his testimony he charges the murder upon the wife of the victim. In so doing, has he kept back and concealed what would, if divulged, implicate himself in the commission of the deed, or show that he aided and assisted the woman in its commission? Has he told the whole truth in respect to the death of N.? Has he satisfied you that the woman, alone and unaided, perpetrated the crime? If you are satisfied that he has not told the whole truth in respect to the death of N., that he has kept back and concealed important facts and circumstances connected with such death; if, from the nature of things, you are satisfied, from the testimony that you regard as reliable, that something must have been done in taking the life of N., other than what he has stated: what does such testimony justify you in believing has been suppressed by the defendant? And does what has been suppressed implicate him as aiding and assisting in the commission of the deed, and how? These and like questions are important for your consideration in determining whether the defendant be or be not guilty." *Held*, not liable to the objection that it left the jury to find defendant guilty upon conjecture, or otherwise than upon the evidence.

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76	96
48	288
79	180
48	288
82	579
48	288
90	263
48	288
100	310
100	313
48	288
106	168
48	288
108	117
48	288
111	*189

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3. An instruction that the jury should find the accused "guilty of murder in the first degree, or not guilty, according as they should find the fact," even if understood as requiring them to acquit him entirely in case they should not find him guilty of murder in the first degree, *held* to contain no error *injurious to the defendant*.
4. This court is of opinion that there was no error in refusing to grant a new trial on the ground that the verdict against the accused was contrary to the evidence.

ERROR to the Circuit Court for *Rock County*.

A. Hyatt Smith, for the plaintiff in error.

The Attorney General, for the state.

COLE, J. At the April term of the circuit court for Rock county, 1879, the plaintiff in error was put upon trial on an information charging him, in apt words, in one count with the murder of one George Mack; and in another count with being an accessory before the fact to such murder, committed by Belinda Mack. On the trial, the prosecution, among other witnesses, called R. D. Whitford, who, upon being sworn, among other things testified that he was present at the examination of Belinda Mack, at Beloit, in July, 1878, on the charge of the murder of her husband, George Mack, and took minutes of the testimony given on such examination, for the district attorney; and that the plaintiff in error was sworn and examined as a witness on behalf of the state. The witness Whitford was then asked to state the testimony which the plaintiff in error gave on that occasion in relation to his being sick at the house of Mack; and also to state the testimony which the plaintiff in error gave in regard to a conversation which he had with Mrs. Mack during the time he was sick. The counsel for the plaintiff in error objected to the admission in evidence, on the trial of this cause, of the testimony which was given by him on the examination of Belinda Mack on the charge of the murder of her husband, because or for the reason that the plaintiff in error was then under arrest and in charge of the officer at the time of his examination. The ob-

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jection was overruled, and the testimony admitted. The first error assigned is this ruling of the circuit court.

The learned counsel for the plaintiff in error insists that the testimony of a party given on the examination while the person is under arrest, as in this case, charged with crime, is never admissible in evidence against him when he is upon trial for the same offense; and he relies upon the cases of *Hendrickson v. The People*, 10 N. Y., 13; *The People v. McMahon*, 15 N. Y., 384; *Teachout v. The People*, 41 N. Y., 13; and *Schoeffler v. The State*, 3 Wis., 823, in support of this position. The question as to whether or not the evidence was admissible is surely so thoroughly and exhaustively discussed, both upon principle and authority, in the above cases, that it seems a mere work of supererogation to attempt to add anything to what is there said. In the first case *Hendrickson* was called and sworn as a witness upon the coroner's inquest upon the body of his wife. The inquest was held upon the same day the deceased died, and before he was charged with her murder; indeed, before it was ascertained that a murder had been committed. His statements, made before the coroner, of the circumstances attending her death, were held admissible in evidence on the trial of an indictment charging him with her murder. Judge PARKER gave the prevailing opinion, which is marked by great learning and most vigorous reasoning. This case was decided in April, 1854.

The case of *The People v. McMahon* was decided in June, 1857. The head note states with sufficient accuracy the scope and effect of the decision. It is as follows: "The prisoner was arrested by a constable, without warrant, on suspicion of being the murderer of his wife. The constable took him before the coroner, who was holding an inquest on the body of the murdered woman, by whom he was sworn and examined as a witness. *Held*, that his evidence, as given before the coroner, was not admissible on the prisoner's trial for the murder." Judge SELDEN gave the opinion of the court, and

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reiterated the views stated by him in his dissenting opinion in the Hendrickson case. If his views were to be accepted as the opinion of the court, it is very manifest that the rule laid down in the previous case is greatly qualified, if not directly overthrown. So the decision stood when *Teachout v. The People* came before the court in 1869. In this case it was decided that the statements made by the prisoner under oath, at a coroner's inquest upon the body of his wife, are admissible against him upon his trial for the murder, although he knew at the time he was sworn that it was suspected the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumor implicated him, and that he had a right to refuse to testify. Judge WOODRUFF gives the opinion, in which, after reviewing and criticising the views of Judge SELDEN as expressed in the McMahon case, he finally reaches the conclusion that the decision in *Hendrickson v. The People* "should be regarded as settling the question raised in this case, and that no error in law was committed in permitting the declarations of the prisoner, made before the coroner, to go to the jury for their consideration."

The case of *Schoeffler v. The State* was decided at the June term, 1854. It is quite similar in its facts to the case of Hendrickson, except that the deposition was taken after suspicion had attached to the defendant in the neighborhood. The decision in the Hendrickson case is referred to by Mr. Justice SMITH with strong approval, and the doctrine of that case was adopted as establishing the correct rule on the subject.

In the light of these authorities we are inclined to the opinion that the ruling of the court below admitting the testimony was correct. It will be noticed that the plaintiff in error was examined as a witness in a prosecution against Belinda Mack. There is no pretense for saying that his testimony on that examination was not entirely voluntary in every legal sense. It is quite true he was himself at the time actually under arrest —

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perhaps resting under a strong suspicion of having had some agency in the murder. He might have refused to testify on that examination, on the ground that his answers would tend to criminate himself. But if he was willing to give his evidence and did voluntarily testify, we cannot see why, upon principle and within the reasoning of the above authorities, his testimony may not be subsequently used against him. There is another consideration which tends to strengthen this conclusion. In this state, by statute, in all criminal trials and prosecutions, the accused, if he so desires, may be a witness for himself. Now suppose the plaintiff in error should obtain a new trial, and on that trial should give testimony materially different from that which he gave on the first: could there be a doubt that, in that case, his testimony on the first trial might be given in evidence on the second, for the purpose of affecting his credibility?

Mr. Greenleaf states the rule as follows: "But where the prisoner, having been examined as a witness in a prosecution against another person, answered questions to which he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his answers are deemed voluntary, and, as such, may be subsequently used against himself for all purposes; though, where his answers are compulsory, and under the peril of punishment for contempt, they are not received." 1 Greenleaf's Ev., § 225. There is no ground for claiming, as it appears to us, that the testimony given by the plaintiff in error, on the prosecution against Mrs. Mack, was compulsory, or was procured through some threat or promise which could have influenced him in giving his testimony. The officer who had the plaintiff in error in custody at the lock-up, says that he had this conversation with him: "He (the plaintiff in error) told me that he didn't have anything to do with it. He got kind of afraid they were going to lynch him. I told him if he hadn't anything to do with it, he need not be afraid." This certainly does not show that there was

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any inducement or threat held out to the plaintiff in error to make him testify on that occasion. As a matter of course, if his testimony was properly received, there was no error in the ruling of the court refusing to strike it out, which is the second error assigned.

The next exception is taken to this charge of the court: "By his testimony, he charges the murder upon the wife of the victim. In so doing, has he kept back and concealed what would, if divulged, implicate himself in the commission of the deed, or show that he aided and assisted the woman in its commission? Has he told the whole truth in respect to the death of Mack? Has he satisfied you that the woman, alone and unaided, perpetrated the crime? If satisfied that he has not told all the truth in respect to the death of Mack, that he has kept back and concealed important facts and circumstances connected with such death; if, from the nature of things, you are satisfied, from the testimony that you regard as reliable, that something must have been done in taking the life of Mack, other or different from what he has stated — what does such testimony justify you in believing has been suppressed by the defendant? And does what has been suppressed implicate him as aiding and assisting in the commission of the deed, and how? These and like questions are important for your consideration in determining whether the defendant be or be not guilty." The criticism made upon this charge is, that it was equivalent to telling the jury that they might, by conjecture or surmise, supply any fact or missing link in the chain of evidence offered to convict the plaintiff in error of the crime of which he was charged, and were not bound to find a verdict solely on the evidence in the case. But we do not think the charge is fairly open to any such criticism. The jury were, in effect, told that they must be satisfied, from the testimony in the case which they regarded as reliable, that the plaintiff in error aided and assisted in the commission of the murder. The jury could not have sup-

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posed they were at liberty to look outside of the evidence in making up their verdict.

The court further charged the jury: "Your verdict will be guilty of murder in the first degree, or not guilty, according as you shall find the fact." This was excepted to on the part of the plaintiff in error.

It is not very obvious to our minds how the plaintiff in error could have been prejudiced by this charge. The jury were told that they must find him actually guilty of murder in the first degree, or acquit him. It must be presumed the jury were properly directed upon the law as to what facts must be established before they could convict him of murder in the first degree. If they did not find, upon the evidence, that he was guilty of that crime, then they must acquit, though there were facts which showed that he was guilty of a lesser degree of homicide. This is the purport of the instruction, and is in favor of the plaintiff in error.

The only other error assigned is in overruling the motion for a new trial because the verdict was contrary to the evidence. We have not read all the manuscript bill of exceptions, which is very voluminous, but we have looked into it sufficiently far to be able to say that there was no error in refusing to grant a new trial on the ground stated.

By the Court. — The judgment of the circuit court is affirmed.

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 IN THE MATTER OF THE WILL OF SARAH M. BLAKELY.

December 18, 1879 — February 3, 1880.

WILLS. EVIDENCE on question of testamentary capacity.

1. In this case, this court, reversing a judgment of the circuit court, holds that the testatrix possessed testamentary capacity when the will was made; the questions being only as to the force of evidence.

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2. The will was made April 7, 1876, and the incapacity alleged was dementia, accompanied by insane delusions. *Held*, that clear, sensible and perfectly coherent letters written by the testatrix during the year 1875, and as late as February, 1876, upon business and other matters, are entitled to considerable weight in determining the issue.
3. The other evidence in the case, though showing eccentricity, caprice, fretfulness, and a suspicious and irritable temper, *held* not sufficient to establish either a lack of mental capacity in the testatrix, or insane delusions which would prevent the use of her faculties in disposing by will of her property. *The Chafin Will Case*, 32 Wis., 557; *Holden v. Meadows*, 31 id., 234; and *Burnham v. Mitchell*, 34 id., 117 — followed and approved.
4. The weight to be given to the testimony of medical experts in such cases, somewhat considered.

APPEAL from the Circuit Court for *Winnebago* County.

The circuit court reversed an order of the county court of said county, admitting to probate the will of Sarah M. Blakely. From the judgment of the circuit court, this appeal was taken by *David Blakely*, contestant of the will.

Charles E. Pike, for the appellant.

For the respondent, there were briefs by *George W. Burnell*, and oral argument by *Mr. Burnell* and *Charles W. Felker*.

COLE, J. The sole question in this case relates to the testamentary capacity of *Mrs. Blakely* to make the will executed by her on the seventh of April, 1876. The validity of the will is contested by her surviving husband, *David Blakely*, heir-at-law. The county court admitted the will to probate; but on appeal the circuit court decided that the testatrix was incompetent, by reason of mental unsoundness and insanity, to make a valid will, and reversed the order. The circuit court found from the evidence that *Mrs. Blakely* had been of unsound mind and chronically insane for a long time prior to the making of the will; that such insanity was of the type known as dementia, accompanied by insane delusions; and that the provisions of the will were influenced by and were

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the result of such insane delusions. Considerable testimony was produced on the trial, on the one side for the purpose of proving that the testatrix was of sound mind and memory when she made the will; and on the other side to show that she was not. This testimony was analyzed and discussed with much clearness and ability by counsel on both sides, on the argument. Owing to the pressure of other duties we shall be compelled to deal with the questions of fact in a summary way, doing little more than stating the conclusions we have reached upon the evidence. In our deliberations, however, we have endeavored to give due consideration to all the evidence bearing upon the question of the testamentary capacity of Mrs. Blakely prior to and at the time she made her will, and also to the remarks of learned counsel upon the testimony.

We may say at the outset, that it appears the testatrix was formerly the wife of one Mr. Pratt, a farmer, and resided in Corning, New York. In the latter part of the year 1869, she, then being a widow without children, married the contestant, a widower having several children and residing in the township of Neenah, in this state. Of her early history or former married life we know but little. One of her brothers, who was a witness for the proponent of the will, testified that when she was a school girl she used to laugh and cry easily; and this peculiarity in her character seems to have increased as she grew older. In the latter part of her life, she became large and gross. In the summer of 1873, she was ill from a protracted fever. After her recovery, she visited her relatives in Iowa, and returned to her husband's home in October. Some time previous to this visit, she had a large rupture — "*umbilical hernia*," as her physician, Dr. Barnett, says, who was called to treat her in the summer of 1874; and from this rupture she suffered at times severely. She was obliged to wear a truss, or supporter, which it was extremely difficult to keep in position on account of her weight. She had a stroke of

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apoplexy — or paralysis, as it is indifferently called in the testimony—about the 10th of December, 1875, which shock produced a depressing effect upon her spirits, causing frequent paroxysms of grief and crying, also affecting her speech, and making her lame in one side. Dr. Barnett attended her upon this occasion, making several professional visits, and, according to his recollection, though of this he was not positive, there were decided symptoms of improvement between his first and last visit. In April following, she made the will which is now contested.

The various provisions were dictated by herself to the magistrate who wrote it. She was not ill at the time, but could walk about the house, though lame. She talked with difficulty, but could generally make herself understood. Soon after making her will, she went to Iowa again to visit her relatives, where she had another paralytic stroke. She returned home about the 11th of September. On the 26th of that month, she was sent to the Northern Hospital for the Insane, and died there March 10, 1877. Up to the time she last returned from Iowa, her memory seemed good. During the year 1875, and certainly as late as February, 1876, she wrote clear, sensible and perfectly coherent letters to her relatives in Iowa about business matters and in regard to the management of some loans she had made in that state. To our minds, these letters are entitled to considerable weight as bearing upon the question of her mental condition and testamentary capacity prior to, and shortly before, making the will. They may not be conclusive upon the question whether she was sane when they were written; but it is not easy to believe they were the productions of a person stricken with chronic dementia—a type of insanity, according to the medical testimony, usually of slow progress, marked in its early stages by general impairment and enfeeblement of the intellectual faculties, and ending in mental decay and idiocy. It may be true, as claimed by the learned counsel for the contestant, that mental pervers-

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sion and insane delusion do not exhibit themselves as soon in the correspondence as in the acts and conduct of the insane; but it seems hardly credible that one incapable of continued thought and attention, and who had nearly lost her intellectual powers, could have written some of these letters. But, to pass on, what is the evidence relied upon to show that the testatrix was incompetent, by reason of mental unsoundness and insanity, to make a valid will in April, 1876?

It is said by contestant's counsel, that the testimony overwhelmingly shows that her mind then was, and had been for a long time, full of insane delusions, not only upon particular subjects and in reference to a particular person, but upon all subjects. The facts relied on to prove unsoundness of mind and insane delusions on the part of the testatrix, before and at the time she made her will, are these: She was subject, the witnesses say, while she lived in Neenah, to frequent fits of crying and laughing without any apparent cause. Her conduct oftentimes was strange and unnatural. She was easily excited into passion and frenzy. At an early period she conceived a great dislike or antipathy for her husband, and every one connected with him, which continued to the end of her life. She was constantly complaining of him, and about his character, house and surroundings. She was very suspicious of him; accused him of stealing from her. She also accused others of taking her papers, opening her letters, and other things of like character. She believed her husband was meditating some fraud upon her rights, or intended leaving her or procuring a divorce. She took up the strange notion, on one or two occasions, that he had committed suicide, or was about to be murdered. Most of these suspicious apprehensions and fancies were doubtless groundless—the offspring of her peculiar temperament and nervous organization; for it is perfectly manifest, from all of the testimony in the case, that Mrs. Blakely was a very eccentric and peculiar person. She was excitable, nervous, flighty

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and hysterical. She was suspicious of all, discontented and unhappy. Her married life was unhappy from some cause; whether through her own fault or the fault of her husband, is left in the dark. She was dissatisfied with her house, which was not as comfortable, well finished and furnished as the one she had lived in before her second marriage. There were defects in the house well calculated to worry and annoy any careful, prudent housekeeper. She always insisted that her husband had deceived her in respect to his home and its surroundings, and as to his pecuniary circumstances. What foundation there was for this complaint or charge, can never be known. But, considering her idiosyncrasies, her bad rupture and poor health generally, she might have been dissatisfied and fault-finding with any one under the most favorable conditions. For true it is, she was probably not one of those happily constituted persons who make the best of everything, and meet the rough and smooth in life with an equal countenance. Possibly her husband was in some degree responsible for her discontent, irrational conduct and constant complaining. The real home life of husband and wife is concealed from the public eye, and it is not easy to discover who is really responsible for domestic discord. Not unfrequently harsh language, cold manner, indifference to the wants and feelings of each other, a lack of sympathy and kind attention, alienate affection and create dislike between them as effectually as the most flagrant acts of cruelty. But, however this may be, we do not discover anything in the conduct, or foolish caprices, or ungrounded suspicions of Mrs. Blakely, which satisfies us that she was under the influence of insane delusions at the time she made her will, or was then wanting in testamentary capacity. Everything said or done by her is quite consistent with mental health in a person of her peculiar organization and temperament.

In its leading features and the facts relied on to prove insane delusion and chronic unsoundness of mind, the case is

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very much like that of Chafin, 32 Wis., 558. Indeed, Chafin's life and conduct were more marked by the exhibition of wild vagaries, absurd opinions and foolish suspicions, and a bitter dislike of those who should naturally have been the objects both of his affection and bounty, than anything we find in the life and conduct of Mrs. Blakely. Yet it was held that all these mental peculiarities and eccentricities of character and conduct on the part of the testator were entirely consistent with the condition of sanity. The ruling of the circuit court in this case in respect to testamentary capacity, and as to what is proof of insane delusion, cannot be affirmed without overruling that decision. In the Chafin case, also, that which distinguishes insane delusion from mere caprice and eccentricity of character, is clearly pointed out, and the remarks of Mr. Justice LYON on that subject are directly applicable to the testimony before us.

What constitutes a sound mind, within the meaning of the statute, or what degree of mental power the testator should possess in order to make a valid will, was a question incidentally considered or directly passed upon in *Holden v. Meadows*, 31 Wis., 284; the *Chafin case*, *supra*; and *Burnham v. Mitchell*, 34 Wis., 117; and need not be dwelt upon now. It is sufficient to say that the rule laid down on this subject by Judge DAVIES in *Delafield v. Parish*, 25 N. Y., 29, was adopted; which is, in substance, that it is essential the testator should have sufficient capacity to comprehend the nature of the act and its effects, and should perfectly understand the extent of his property of which he is disposing, and his relation to all persons who have claims upon his bounty.

The testatrix seems to have possessed this degree of mental power and understanding, and the evidence does not justify the conclusion that her mind was under the influence of any insane delusion which would pervert or disturb its faculties in making a testamentary disposition of her estate. The evidence further satisfactorily shows that the disposition which

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she did make of her property was in entire harmony with her frequently declared purpose. She had often said that she intended to give her property to some religious or benevolent institution. The evidence does not inform us of the value of her estate, though it was stated by counsel on the argument, as we remember, that it would amount to about \$6,000. By the will she gave her husband \$250, which she states she let him have about six years before, and which he was to repay with ten per cent. interest; and the rest of her property she gave to the Home for the Friendless in the city of New York, to the American Tract Society, and to the *American Bible Society*—the great bulk of her property being given to the latter institution. Now, how can we say, looking at the will alone, that this was not a suitable and perfectly proper disposition for her to make of her property under the circumstances? It must be borne in mind that the law allows a person of sufficient capacity and requisite age “to do as he will with his own.” The courts have no right to control the exercise of this power because the disposition made does not seem just and natural. The testatrix had said to more than one witness that she was under no obligations to her relatives; that they had never helped her, or that they were well enough off; and that she would not leave her husband anything, because he had not treated her as he should, and had misrepresented things to her before marriage. She had apparently fully meditated upon the subject, and this was the disposition which she was resolved to make of her estate.

There is one, and it seems to us very unimportant matter, which was considerably commented on by the counsel for the contestant, and which perhaps requires a passing word. Mr. Conlan, who drew the will as dictated by Mrs. Blakely, testified that she asked him on that occasion a good many questions, and wanted to know whether he did not think “it would be a good thing to give her money to the *Bible Society*, because there were a good many people who had no Bibles, saying she

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did not believe in the Bible herself." It is said that it is strong evidence of an unsound mind, that she should leave her property for the dissemination of the Bible, which she did not believe in. This might be so could we rely on the correctness of this statement of the witness. But we have no doubt that he misapprehended the meaning of the testatrix. Her whole life, so far as we know anything about it, contradicts and disproves the statement. She was a member of the Presbyterian church, frequently attended divine worship, and was familiar with the Bible, as the little incident related by Mrs. Fanny Morris, about helping *Mr. Blakely* and the witness's mother recall an unfamiliar Bible name, amply shows.

Much reliance is placed upon the medical testimony offered on the trial by the counsel for contestant. Dr. Barnett was sworn on the part of the proponent, and testified that he attended professionally on Mrs. Blakely in 1873, 1874 and 1875, and that in these visits he discovered nothing in her which would incapacitate her for business; that he saw no signs of insanity, nor any evidence of delusion. After the paralytic stroke in December, 1875, he discovered very great mental enfeeblement, so much so as to be unsoundness or insanity of the peculiar type called dementia, *in some degree*. He saw her in February, 1876, but recollects no particulars of that visit, and says nothing about her mental condition at that time. He closed his testimony by saying that he should not consider her as being in a proper condition of mind to attend to business in the spring of 1876. Dr. Hunt, a witness on the same side, saw Mrs. Blakely several times in the summer of 1876, when she was with her friends in Iowa, three times professionally. He says she acted like an old person who had become weak and childish, but showed no indications of insanity, and that he did not have a suspicion that she was insane. Dr. Russell, also a witness for the proponent as a medical expert, gave a description of the characteristics of dementia. He says that from its commencement it diminishes and grad-

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nally weakens the powers of the intellect. Some things which appeared unnatural and strange in the conduct of Mrs. Blakely, he thought might be the result of nervous excitement or transient delusion, and might attend sanity. Dr. Kempster, the superintendent of the Northern Hospital for the Insane, was sworn for the contestant. He states that he examined Mrs. Blakely when she was first brought to the hospital in September, 1876, and saw her frequently afterwards. He says she was a diseased person when he first saw her, and was insane; that her type of insanity was dementia, usually a chronic disease; that she was in an advanced stage of the disease when she came to the hospital. At this time she expressed fear of personal violence; that people would take advantage of her, and that she would receive bodily harm from some indefinite source. This is the first time that we learn that she was under any such delusion, and it must have come upon her at a recent period, or other witnesses would have spoken of it. The doctor does not believe in any such thing as partial insanity. He gave it as his opinion that Mrs. Blakely must have been of an unsound mind in April, 1876. Indeed, the doctor seemed to think that dementia in its first stages necessarily disqualifies a person from transacting business, and that as early as 1873 the testatrix had not sufficient strength or vigor of intellect to make a valid deed. This, in short, is the substance of the medical testimony; and it must be apparent that it does not afford a very safe and satisfactory guide to a decision of the question at issue. Taken altogether, it leaves the mind in great doubt and perplexity as to the real mental condition of the testatrix before and at the time she executed the will.

Dr. Kempster is certainly a high authority on the nature of the disease of insanity. He has made the disease a special study for years, and has been largely engaged for a long time in the treatment of the insane. Yet the rule he lays down in

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regard to insanity would be a dangerous one to apply in the business transactions of life. He thinks the testatrix was incapable of making a contract as early as 1873; yet at this time, and for more than two years afterwards, her family physician, who visited her many times, saw no indications of unsoundness of mind, no weakness of her intellectual powers, and no mental disorder. She attended to her own affairs then and afterwards in an intelligent manner, and wrote the letters to which we have already referred. It is very obvious that there is a great divergence in medical and judicial opinion in regard to the effects of insanity upon the mind, doubtless owing to the different standpoints from which the subject is considered. In the *Parish Will Case*, 25 N. Y., 115, Judge SELDEN alludes to this in the following language: "If a medical witness comes to the conclusion, from the mental manifestations of an individual, that his mind is disordered, that he is insane or imbecile, and from this infers that his brain is diseased, and then tells us that this disease of the brain must necessarily destroy the intellectual powers, we have gained nothing whatever from medical science; we have simply reasoned in a circle. We have arrived at the end of the inquiry as to mental capacity before touching upon the connection between the mind and the brain, which connection alone brings the question within the scope of that science. Physicians are not necessarily metaphysicians. Their science relates to the physical man, and to his moral and mental condition only as connected with his physical. Their opinions, therefore, can be considered as properly scientific only to the extent in which this connection is involved. So far, then, as the medical opinions in this case bear upon the degree of cerebral disease indicated by the apoplexy, the paralysis, the loss of speech, the convulsions and other physical symptoms, they are to be regarded as the opinions of experts. But in so far as they rest upon the evidence going to show a want of intel-

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lect directly, and not merely as the result of disease of the brain, they derive very little, if any, additional force from the professional education of the witnesses."

Judge COOLEY makes some very sensible and discriminating remarks as to the value of medical expert testimony, and the weight to be given to it in this class of cases, in *Fraser v. Jennison*, a case recently decided by the supreme court of Michigan. (See *The Northwestern Reporter*, January 10, 1880, p. 595.) He says: "But it would be in a high degree dangerous, as well as unjust, to deprive a man of the control of his property as soon as the indications of mental disease appear, notwithstanding he may still be managing it with propriety and judgment. For legal purposes, incapacity, either criminal or civil, must be judged of by manifestations in conduct and language. The circumstances and symptoms of mental disorder may aid in understanding the manifestations subsequently appearing, but they can have little further value. The expert can never be put in the place of the jury, and be allowed to decide the case on his opinion of what was naturally to be looked for in the mental history of a person shown to have had peculiar surroundings and a peculiar experience." And the learned judge adds this pertinent and weighty observation, which it is well to bear in mind, namely, that "there is no doubt that the law of insanity is in danger of falling into contempt in testamentary cases as well as in criminal, and very largely because the examination of experts is conducted under an apparent belief that the slightest taint of mental disorder destroys capacity, even though the conduct has apparently never been affected by it." The *Fraser* case is instructive, and has a direct bearing upon some of the questions we are considering. There the testator was 83 years of age when he made his will, dated May 17, 1877, and, as we infer from the question put to a medical expert, became a raving maniac in a few weeks after, dying August 2d following. The medical witness had stated, on a supposed case,

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that the testator was not in a sound mind when he executed his will; but the will was sustained by the court.

Now Dr. Kempster testified that in his opinion there was no such thing as partial insanity; that a man was either sane or insane. This may be true considered in the light of medical science, but it is not true in the law, as is apparent from the decisions of some of the most eminent and distinguished jurists who have adorned the bench in this country and in England. For the testamentary dispositions of monomaniacs have often been sustained in spite of their mental disorder, where the insane delusion did not influence the mind of the testator in disposing of his property, or in bringing about such a disposition as would not have been made if his mind had been sound.

We have not time to notice all the items of evidence relied on by the counsel for the contestant to show that the testatrix was of unsound mind when she made her will. We have alluded to so much of the evidence as we deemed most important and material, bearing on the question of insanity; and, as already indicated, our conclusion upon the evidence is, that the testatrix was laboring under no insane delusion when she executed the will, nor were her mental powers so feeble that she was then wanting in testamentary capacity, within the statute.

It follows from these views, that the judgment of the circuit court must be reversed, and the cause be remanded to that court with directions to affirm the order of the county court admitting the will to probate.

By the Court. — So ordered.

Mœrchen vs. Stoll, Adm'r.

MËRCHEN vs. STOLL, Adm'r.

January 7 — February 3, 1880.

ESTATES OF DECEDENTS. *Appeals from decisions on claims.*

Plaintiff presented to the commissioners appointed to adjust demands against an estate, a claim for money loaned to the decedent, and also one for labor done for him; and the commissioners allowed a certain sum for money so loaned, but wholly disallowed the claim for labor; and thereupon the administrator of the estate appealed from the former allowance, but plaintiff did not appeal from the disallowance of his claim for labor. *Held*, that the only question which the circuit court could adjudicate was the amount due plaintiff as for money loaned; although testimony as to both claims was taken before a referee, without objection.

APPEAL from the Circuit Court for *Manitowoc* County.

Plaintiff appealed from a judgment of the circuit court disallowing his claim against the estate of defendant's intestate, for labor performed for the deceased. The case is stated in the opinion.

For the appellant, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*.

For the respondent, there was a brief by *Nash & Schmitz*, and oral argument by *Mr. Nash*.

COLE, J. The plaintiff, as creditor of the estate of Ambrose Oschwald, presented a claim to the commissioners appointed under the statute to examine and adjust all demands against the deceased, for money which he had let the deceased have, and also for work and labor which he had rendered the deceased. The commissioners allowed the plaintiff \$1,028 for money which he had loaned the deceased, and wholly disallowed the claim for work and labor. The administrator appealed from the decision of the commissioners allowing the money claim. The plaintiff took no appeal from their decision disallowing his other claim, for services. The cause proceeded to a hearing in the circuit court upon the issues therein

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made and upon testimony taken before a referee, by consent, the same as though both parties had appealed from the decision of the commissioners; or rather, no objection was taken that the claimant had not appealed; and that court ruled that the plaintiff was not entitled to receive compensation for his services rendered the deceased, but was entitled to recover the money which he had loaned him, and affirmed the decision of the commissioners upon both claims. This appeal is from so much of the judgment of the circuit court as disallows the plaintiff's claim for labor and services rendered the deceased.

It seems to us the circuit court was wrong in assuming, as it seems to have done, that the disallowed claim of the plaintiff was removed to that court by the appeal of the administrator, and in considering that claim at all. The claims of the plaintiff presented to the commissioners were wholly distinct and independent in their nature, in no sense forming one contract. One might properly be considered, allowed or disallowed in part or in whole, without reference to the other claim. If, for instance, the commissioners had allowed less on the money demand than the plaintiff claimed was due him, perhaps an appeal by the administrator from what was allowed would bring to the consideration of the circuit court the merits of that entire demand, so that the allowance of the commissioners could be increased if the testimony showed that it ought to be. But we do not see upon what principle it could be claimed that the appeal which was taken had the effect to bring up a totally separate and distinct claim, which had been disallowed, and from which disallowance no appeal had been taken.

The statute gives a creditor the right to appeal from the decision and report of the commissioners to the circuit court of the same county, if application for such appeal is made in writing, and filed in the office of the county judge within sixty days after the return of the report, upon executing a bond to the adverse party, with sufficient sureties, to be ap-

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proved by the judge, and conditioned as prescribed in sections 20, 21, ch. 101, Tay. Stats., in a case where the commissioners disallow a claim in favor of such creditor, in whole or in part, to the amount of \$20. Section 22. The statute then provides what the appealing party shall do to bring his appeal to a hearing in the circuit court. Among other things, he must procure and file in the circuit court, at or before the next term of such court after the appeal is allowed, "a certified copy of the record of the allowance or disallowance appealed from," etc. Section 24. When such certified copy is filed in the circuit court, such court proceeds to the trial and determination of the same, according to the rules of law, allowing a trial by jury of all questions of fact in cases where such trial may be proper. Section 25. But where a party fails to appeal from the disallowance of his claim by the commissioners, or neglects to prosecute his appeal to effect when taken, the decision of the commissioners is conclusive as to his rights. For it is the manifest intent and policy of the statute, that the party aggrieved by a decision of the commissioners should himself appeal, give the requisite security, and procure the necessary record for the action of the circuit court on the appeal. Surely this ought to be the case where a creditor presents a claim against an estate, consisting of different and wholly independent items or charges, some of which may be allowed and some disallowed by the commissioners.

To assume or suppose that, by the appeal of an administrator or executor from the decision allowing some items of the claim or account, the disallowed items were removed to the circuit court for review and examination, is an inference unwarranted by the statute. Here the administrator did not object to the decision of the commissioners disallowing the claim for labor and services, but acquiesced in it. There never was an appeal from such disallowance taken by any one; and it therefore was not before the circuit court for examination. Consequently, holding as we do that the plaintiff's

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claim for labor and services rendered the deceased was not, under the circumstances, before the circuit court for trial and determination, we affirm the judgment, without going into the question of the justice or merits of that claim, as if the plaintiff himself had taken an appeal from the decision of the commissioners.

By the Court.—The judgment of the circuit court is affirmed.

FICK VS. MULHOLLAND.

January 7—February 3, 1880.

SPECIAL VERDICT. *Fraud as to creditors. Inconsistent answers.*

Where the issue was, whether a sale of chattels to the plaintiff was fraudulent as to the vendor's creditors, the jury found specially that the vendor conveyed said chattels with certain real estate to plaintiff for a valuable and adequate consideration, expressed in the deed of conveyance, and that plaintiff did not then know that his vendor was indebted to any persons other than those holding mortgages on the premises, which plaintiff assumed to pay; but further found that at the time of the sale plaintiff knew that his vendor was in failing circumstances; that such vendor did not make the sale in good faith, without intent to defraud his creditors; and that plaintiff knew of the vendor's fraudulent intent. *Held*, that the answers are inconsistent, and not sufficient to sustain a judgment against the plaintiff.

APPEAL from the Circuit Court for *Manitowoc* County.

Action by *Fritz Fick* to recover possession of personal property. There was a special verdict, which is stated in the opinion. The court denied plaintiff's motion to set aside the verdict, and rendered judgment thereon in defendant's favor; from which the plaintiff appealed.

For the appellant, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*.

For the respondent, there was a brief by *Nash & Schmitz*, and oral argument by *Mr. Nash*.

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ORTON, J. The plaintiff in this action claims the ownership of the property in question by a conveyance from one Christian Fick, and the defendant justifies the taking by certain attachments and executions in his hands, as sheriff, against Christian Fick, on the ground of fraud in such conveyance.

The special findings of the jury are clearly inconsistent and contradictory, if they do not warrant a general finding for the plaintiff on this issue.

The findings on this question were: "*First*. Did Christian Fick convey to the plaintiff, for a valuable consideration expressed in the deed of conveyance, the property described in the complaint in this action, on the 14th of December, 1876? *A.* He did." "*Second*. If you answer that he did, then was such consideration adequate to the value of the property? *A.* It was." "*Third*. Did the plaintiff know that Christian Fick was indebted to any persons other than persons holding mortgages on the premises, which he assumed to pay? *A.* He did not." "*Sixth*. At the time of the sale of the property to him by Christian Fick, did the plaintiff, *Fred. Fick*, know that Christian Fick was in failing circumstances? *A.* He did." "*Seventh*. Did Christian Fick make the sale of the brewery property in suit to the plaintiff, *Fred. Fick*, in good faith, and without any intent to defraud his creditors? *A.* He did not." "*Eighth*. If you answer that he did not, then did *Fred. Fick*, at the time of said sale to him, know of such fraudulent intent on the part of Christian Fick? *A.* He did."

The inconsistency and contradiction of these findings are obvious at a glance. The jury find that the plaintiff bought the property for a valuable and adequate consideration, without knowing that Christian Fick was indebted in any sum whatever to any one except to those whose claims he had assumed as part consideration of the purchase; and yet they find that Christian made the sale with intent to defraud his creditors, and that the plaintiff knew it. Christian Fick, at the time of the sale, according to the proof, was indebted only

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to a very small and inconsiderable amount above the claims assumed by the plaintiff; and the jury find that the plaintiff did not even know that he was indebted at all beyond the claims he had assumed, and that he did know that Christian was in failing circumstances.

The natural presumption, which should be the legal presumption also, from these findings, is, that the plaintiff supposed he was relieving Christian Fick of all of his indebtedness, by assuming the mortgages on his property, and that these mortgages constituted his *failing circumstances*. The plaintiff's knowledge of the fraudulent intent of Christian Fick in making the sale to him, must therefore have reference only to future or subsequent creditors; and there is not a particle of evidence in the case to show that the plaintiff made the purchase with any such reference, or with any such intent. It is elementary, that fraud must be proved by clear and satisfactory evidence.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial therein.

DOOLAN VS. THE CITY OF MANITOWOC.

January 7 — February 3, 1880.

CITY. *Salary of night-watchman determined by terms of resolution appointing him.*

1. Under the defendant's charter, its board of aldermen have power to *appoint* night-watchmen, and to fix their compensation; and where the resolution appointing such a watchman for a year fixed his salary for that year, he cannot recover a larger sum on the ground that he did not know that such resolution reduced the compensation below the sum for which he had served the previous year.
2. Even if the employment of such watchman were not an appointment to public office, he would, on accepting the position, be bound by the terms of the resolution, entered upon the minutes of the board, directing his employment at a certain salary, in the absence of any proof of a subse-

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quent modification of the contract; and payment for two quarters of the year at a higher rate, made by the city treasurer without the order or even knowledge of the board of aldermen, is no evidence of such a modification.

APPEAL from the Circuit Court for *Manitowoc* County.

Defendant appealed from a judgment in plaintiff's favor for \$100 damages, alleged to be due plaintiff for his labor and services as night-watchman in the defendant city, from February 1 to May 1, 1876.

C. E. Estabrook, for the appellant.

The cause was submitted for the respondent on the brief of *J. D. Markham*.

TAYLOR, J. This action was brought by the respondent for a balance of \$100, claimed to be due to him as a night-watchman in one of the wards of the city of Manitowoc for the year ending the first of May, 1876. The only evidence of his appointment as watchman by the city was a resolution of the board of aldermen, adopted on the tenth day of May, 1875, as follows: "On motion, council proceeded to ballot for night-watchman of the fourth ward, and on the first formal ballot *M. Doolan* received a majority of all the votes cast, and was declared duly elected at a salary of \$300 per annum." The evidence showed that he had been appointed like watchman for the previous year at a salary of \$400 per year, and that he was an applicant for the appointment for the year 1875-6, and was present when he was appointed for said year; but he denies that he understood that his salary was fixed at \$300 per year, and affirms that he supposed he was to have the same salary he had received the year before. He was paid \$100 at the end of the first and second quarters of this year; and when he called for his pay for the third quarter, he was refused, on the ground that his salary was but \$300 per year. Afterwards, and before the commencement of this action, he was paid another \$100, making in all \$300 for his year's salary.

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Under this state of facts, it is claimed by the appellant that the plaintiff has been fully paid for his services as watchman for the year ending May 1, 1876, and that he has failed to make out any cause of action against the city. The learned circuit judge held otherwise, and directed a judgment in favor of the plaintiff for the sum of \$100. We are of the opinion that the learned judge erred. The facts show that the plaintiff did not continue his employment under his appointment for the previous year. He clearly understood and recognized the fact that it was necessary for him to get a new appointment to the place in May, 1875, and he presented the council a petition for such appointment at that time, and swears that he knew the board of aldermen for 1875 appointed him upon his petition as watchman for the year 1875-6.

The city charter, ch. 275, P. & L. Laws of 1870, ch. V, sec. 14, provides "that the board of aldermen shall have power to appoint such other officers as may be necessary to carry into effect the provisions of this act, and to *prescribe the duties and fix the compensation of all officers elected or appointed by the board of aldermen. Such compensation shall be fixed by resolution at the time the office is created, or at the commencement of the year, and shall not be increased or diminished during the term such officer shall remain in office.*" Subdivision 20 of sec. 7, ch. VI of said charter, provides that the board of aldermen shall have power "to regulate the police of the city, to appoint watchmen and firemen, prescribe their duties and punish their delinquencies."

We think that a night-watchman is an officer within the meaning of section 14, ch. V, above quoted, and the power given to the board of aldermen in subdivision 20 of sec. 7 of ch. VI, *to appoint watchmen*, strengthens this view. If watchmen are mere employees of the city, having no public duty to perform, it would have been more appropriate to have conferred upon the board of aldermen the power to employ rather than to appoint them.

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Taking the two provisions together, it seems clear that the intention was not that the city should employ watchmen, but that they should appoint them, and fix their compensation. The compensation being fixed and the appointment made, the appointee was at liberty to accept the position and perform the duties thereof for the salary prescribed, or, if he deemed the salary inadequate, decline to accept; or if, after entering upon the performance of his duties, he became satisfied that the compensation fixed was an inadequate compensation for the labor to be performed, he could decline their further performance without subjecting himself to any liability to the city. But, whether or not a watchman is strictly an officer within the meaning of the section of the charter above quoted, he was clearly bound by the provisions of the resolution of the board of aldermen by which he was appointed. There is no pretense that he continued his services as watchman under an appointment made for any previous year. He recognized the fact that, in order to be continued as watchman, it was necessary that he should procure an appointment by the board of aldermen for the coming year, and for that purpose he presented a petition asking it. He knew, when he presented such petition, that if the board of aldermen acted favorably upon it, the records of the board would show his appointment, and fix his salary or compensation. He says he knew the board acted favorably upon his petition, and he could only know this, in a legitimate way, on inspection of their records. Having entered upon the duties of watchman upon the authority of the resolution of the board appointing him, he cannot plead ignorance of that part of it which fixes his compensation. If he entered upon the duties under the resolution appointing him, the board of aldermen had the right to suppose that he accepted the position with the compensation fixed. He did not solicit the appointment with a definite salary of \$400 or any other sum; he simply solicited the appointment, leaving the question of compensation to be fixed by the board,

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as the law required it should be. The board did fix it, and he performed the service. It is now too late for him to allege that the salary was inadequate, and demand that the city shall pay him more. The petition for an appointment, and the appointment at a stated salary or compensation, formed a special contract, if accepted by the plaintiff.

Had the contract been between two private persons, it would not seem to admit of any doubt. If A. says to B., "I wish you to employ me as your watchman for one year from a given date," and B. replies, "I will employ you as such for said year, and pay you for such service \$300," and, without any further negotiation, A. enters upon the service and continues in it for the year, there can be no reasonable doubt but that he will be bound by the amount of compensation offered by B.

The case at bar is equally strong, if not stronger, against the plaintiff. He was negotiating with the board of aldermen, whose duty as guardians of the rights of the city required them to fix a definite compensation to be paid to their appointees, at the time of appointing them. Knowing this fact, he applies for an appointment, and the board make the appointment and fix the compensation, and plaintiff performs the duty. A special contract as to compensation is made; and in such case the plaintiff cannot recover a greater sum than is agreed upon, without showing that the special contract has been abandoned by mutual agreement, and some other substituted therefor. There is no evidence in this case that there was any change of contract. The payment of \$100 at the end of the first and second quarters by the city treasurer was not shown to have been done upon the order of the board of aldermen, or even with their knowledge. Such payments are not, therefore, evidence of a change of the contract by the board of aldermen, and no acts of any other officer or officers of the city could bind it.

Upon the whole evidence, we think the plaintiff failed to make out any cause of action against the city.

Hall vs. The Chicago, Milwaukee & St. Paul R'y Co.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to that court to enter judgment in favor of the defendant, dismissing the plaintiff's action.

HALL VS. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY.

48	317
115	238

January 7—February 3, 1880.

(1) *Liberal rule of pleading in Justices' Courts.* (2) *Evidence of contract.*
(3) *Evidence of ratification.*

1. A complaint in justice's court, though informal, is sufficient if it states a cause of action so that a person of common understanding would have no difficulty in knowing what is intended.
2. Where there was evidence tending to show that the defendant company had authorized one H. to make a certain contract with plaintiff for boarding some of its employees, or had subsequently ratified the contract so made, there was no error in rejecting evidence offered by defendant to show that it had not in other cases paid such bills except upon special conditions not included in such alleged contract.
3. Payment by defendant to plaintiff for board of the employees in question, for two months subsequent to the alleged contract made by H. in its behalf, if such payment was made with knowledge of the contract on defendant's part, would be evidence of a ratification.

APPEAL from the Municipal Court of the City and Town of *Ripon*.

The case is stated in the opinion.

The cause was submitted on the brief of *Melbert B. Cary* for the appellant, and that of *Dobbs & Turner* for the respondent.

COLE, J. 1. This action was commenced before a justice of the peace, where the plaintiff obtained judgment. The cause was removed by appeal to the municipal court of Ripon. The pleadings in both courts were oral. The defendant objected, on the trial in the municipal court, to the admission of

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any testimony under the complaint, on the ground that it stated no cause of action. The objection was overruled, and that ruling is assigned for error here. The complaint is somewhat informal, but it is not so much so that a person of common understanding would have any difficulty in knowing what is the cause of action intended to be stated. This, by statute, is made the test of the sufficiency of such pleadings. (Section 51, ch. 120, Tay. Stats., and section 3626, R. S. 1878.) It is apparent from the complaint that the cause of action is founded upon an account for boarding the employees of the defendant. Of course, the liability of the defendant, if any existed, arose upon contract, express or implied.

2. We do not think there was any error in excluding the questions asked the witness Rock, which is the next exception relied on for a reversal of the judgment; for if the testimony showed that the defendant authorized Harrington to make the contract with the plaintiff for boarding its employees, which he did make; or if, without having given such authority, it afterwards ratified Harrington's act in that respect—it is plain that it would be liable, whatever responsibility it might have assumed as to other board bills in other cases. The questions which were asked Rock were, in substance, whether the defendant company, while the witness was the superintendent of the northern division of its road, ever paid board bills of hands working on its roads, or assumed responsibility in any case where the bills for such board were not sent to the office of the witness, or were not in his possession, at the time or before the pay-roll was made out. This rule or usage of the company, as to the payment of board bills, might be well enough for its protection, but it did not really affect the question of its liability in this case.

3. Several exceptions were taken to the charge of the municipal judge, as given, and also to his refusal to give certain requests asked on the part of the defendant. The questions of fact affecting defendant's legal liability to pay the plaintiff

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the balance due on his board bill, seem to have been fairly submitted on the evidence, under proper instructions. The jury were told, in effect, that if they found that Harrington had no authority from the company to make the contract or arrangement for boarding the men, which the plaintiff claimed was made, yet if Harrington made such an arrangement with the knowledge of the company, and the company paid the September and October bills, this would amount to a ratification of Harrington's contract in the matter; but, on the contrary, if Harrington had no authority to make that contract, and if defendant knew nothing about it — even if made as claimed, — that the payment of previous bills would be no evidence of ratification of his acts by the company. This is the gist or pith of the charge. As a matter of course, if Harrington assumed to act for the company in making the contract for boarding the men without or in excess of authority given him, he could not bind the company by his acts. But if the company, with full knowledge of all the material circumstances, ratified his acts in that regard, it would be bound. The doctrine of the charge is, that whatever arrangement was made must have been known to the company when it paid the plaintiff for his board bills for September and October, otherwise ratification could not be inferred from such payments. But if the payments were made with full knowledge of the terms of the contract, they would be strong proof of the adoption of the contract by the company. It does not seem to us that the jury could have been misled to the prejudice of the defendant by the charge given.

By the Court. — The judgment of the municipal court is affirmed.

Beyer vs. Vanderkuhlen.

BEYER VS. VANDERKUHLEN.

January 9—February 3, 1880.

HABEAS CORPUS: *Re-imprisonment of person released by: Statute construed.*

1. *It seems* that the provision of sec. 32, ch. 158, Tay. Stats. (sec. 3443, R. S.), that, if any person "shall knowingly recommit, imprison or restrain of his liberty, for the same cause," a person who has been discharged on *habeas corpus*, "or shall knowingly assist or aid therein," he "shall be liable to the party aggrieved" in a certain sum, and shall also be deemed guilty of a misdemeanor, does not apply to the case of a child taken by *habeas corpus* from the custody and control of one parent, on the petition of the other, to whom its custody has been awarded, and afterwards again detained in the custody of the parent first named.
2. If the statute applies to the case above defined, the "party aggrieved," in the sense of the statute, is the child so detained, and not the parent entitled to its custody.

APPEAL from the Circuit Court for *Fond du Lac* County.

The substance of the complaint in this action is thus stated by Mr. Justice COLE:

"The action is brought to recover the penalty given by section 32, ch. 158, Tay. Stats., which declares, in substance, that if any person shall knowingly recommit, imprison, or restrain of his liberty, or cause to be recommitted, imprisoned, or restrained of his liberty, for the same cause (except as provided in the previous section), any person who shall have been discharged on *habeas corpus*, or shall knowingly aid or assist therein, he shall forfeit to the party so aggrieved \$1,250, and shall also be deemed guilty of a misdemeanor. It appears from the complaint, that the plaintiff, by means of a writ of *habeas corpus*, obtained possession of his minor children, who were in the custody of Wilhelmina Beyer, the mother, as we are informed by the brief of defendant's counsel. And it is alleged that after the children had been adjudged and delivered to the plaintiff, the said Wilhelmina forcibly and unlawfully took them from his possession, and restrained them of their liberty; and that the defendant, well knowing the premises,

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but unlawfully intending to defeat the order awarding the children to the plaintiff, did knowingly and unlawfully aid and assist said Wilhelmina in taking the children from the plaintiff, and in preventing him from having the custody of them. This is the gravamen of the complaint."

Defendant demurred to the complaint as not stating a cause of action; and plaintiff appealed from an order sustaining the demurrer.

For the appellant, there was a brief by *Coleman & Spence*, and oral argument by *Mr. Spence*. They insisted that the father was entitled to the custody of his minor children; that the order of the commissioner was valid; that the act of defendant obstructing the execution of such order was one by which the father, and he alone, was "aggrieved;" and that the penalty imposed by the statute was not only to punish the offender, but also to compensate the party aggrieved for any damage by him sustained. See secs. 3442 and 3443, R. S., one of which gives an action to the person "so detained," and the other to the person "aggrieved;" and see also sec. 3966, R. S., and *In re Goodenough*, 19 Wis., 274.

E. S. Bragg, for respondent.

COLE, J. We think the demurrer to the complaint was properly sustained.

It is insisted by the learned counsel for the defendant, that sec. 32, ch. 158, Tay. Stats., has no application to the contest of a parent, or a contest between parents for the custody of their children, but that the penalty attaches for the unlawful recommitment or imprisonment of a person who has once been delivered on *habeas corpus*. It is said that the evil intended to be prohibited was the imprisonment of the citizen over and over again for the same cause or pretended cause or offense, after an adjudication had been had that his restraint or imprisonment was unlawful; that the object of the statute was to protect the liberty of the citizen, and guard against oppres-

Beyer vs. Vanderkuhlen.

sion, by inflicting a penalty for knowingly recommitting a person once set at large. This position of counsel certainly derives great sanction from the language of the statute. The words "recommit" and "imprison" evidently refer to courts or magistrates, and imply some judicial or ministerial act on their part. True, the unauthorized absence of an infant from the legal custody of a parent has been treated, for the purposes of allowing the writ of *habeas corpus*, as equivalent to imprisonment; but the removal of the infant from the parent to whose custody it had been awarded, cannot be deemed a recommitment or imprisonment in any sense of the words.

The provision is a penal one, and must be strictly construed. And it seems to us it would be an unreasonable construction to say that the penalty attached to the acts of the defendant stated in the complaint. In this case the children had been awarded to the plaintiff by the order of the commissioner, and it was certainly wrong, and a violation of that order, for the defendant to aid the mother or any other person in taking the children from the plaintiff's custody. But that the defendant incurred the penalty by his conduct in that regard, is a position which, it seems to us, cannot be maintained. The thirty-second section is substantially the same as the sixth section of the act of the 31st Charles II. (4 Bacon's Abr., *Habeas Corpus*, B., p. 126); and we were not referred on the argument to any case, nor have we been able to find one, which extended the provision to a case like the one at bar. Perhaps we should not be justified in assuming, on the demurrer, that this was a contest between the father and mother for the custody of their children, though defendant's counsel so states in his brief. Of course, if this action will lie, one could be maintained against Wilhelmina Beyer, even if she were the mother. But the question as to the remedy of the father where his children, awarded to him on *habeas corpus*, have been unlawfully taken from his custody, has often arisen and been considered by the courts; and it is strange, if the professional

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understanding was that the penalty extended to a case like the present, that a precedent for the action cannot be found. Penalties are not to be imposed without express words or necessary implication. *Hecker v. Jarrett*, 1 Binney, 374.

But if we are wrong on this point as to the meaning of the section, we fully agree with the defendant's counsel in the view that the plaintiff is not the party to recover the penalty, if an action in such a case could be maintained. The *person aggrieved* is surely the one who is recommitted or imprisoned after having been discharged. And if the penalty is given to any one, it is given to the child in his own right, and not to the father. The penalty is by way of indemnity to the person recommitted or reimprisoned after having once been discharged on *habeas corpus* for the same cause. "That the father has a legal and paramount right to the custody and services of his child will not in general be denied" (*In re Goodenough*, 19 Wis., 274); but this does not clothe the father with all the legal rights and remedies of the child. We do not wish to be understood as intimating that an action on behalf of the child could be maintained upon the facts stated in the complaint. But we do say we have no doubt that the penalty is given to the *person aggrieved*, and the *person aggrieved* is surely the one who is recommitted or imprisoned. Further comments would seem unnecessary to vindicate the correctness of this construction of the section.

By the Court.—The order of the circuit court is affirmed.

MEESE VS. THE CITY OF FOND DU LAC.

January 9 — February 3, 1890.

HUSBAND AND WIFE: Action for injuries to wife. (1) *Query as to separate action by husband, after or pending joint action.* (2) *Abatement of joint action by death of wife.* (3) *Rule of damages.* (4) *Excessive damages.*

1. Whether, under ch. 96, Laws of 1873 (now sec. 2680, R. S.), which provides that, in an action by husband and wife for injuries to the person of the

48	323
76	386
48	323
95	73

48	323
104	571

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wife, plaintiffs "may claim in the complaint, prove and recover, all the damages sustained by both, and which might otherwise be recovered by separate actions," the husband, after a recovery in a joint action for the injuries to the wife, is barred from maintaining a separate action for the loss of her services, expenses of medical attendance, etc., and whether the pendency of such joint action would be a good plea in abatement of the separate action — is not here determined.

2. The joint action by husband and wife for personal injuries to the wife abates by her death; and the husband may then bring a separate action for loss of services, etc.
3. In such an action, the evidence was that the wife had been an invalid for two years before the injury complained of, but that during that period she had been gradually recovering her health, and that prior to such injury the indications were that she would soon recover. *Held*, that there was no error in refusing to submit for a special verdict the question, what was the value of her services per month during those two years.
4. There being some evidence tending to support the finding of the jury as to the value of the services in question, this court cannot reverse on the ground that the amount awarded is excessive.

APPEAL from the Circuit Court for *Fond du Lac* County.

Action to recover damages accruing to the plaintiff by reason of injuries to his wife caused by the defective condition of a public highway in the defendant city. The case is thus stated in part by Mr. Justice TAYLOR:

"Some time in July, 1875, Elizabeth Meese, wife of the plaintiff in this action, was severely injured by being thrown from a buggy in which she was riding across one of the bridges in the city of Fond du Lac. The accident happened by reason of a defect in the bridge; and it is not seriously contended by the learned counsel for the appellant, that the city was not chargeable with knowledge of the defect in the bridge, and therefore bound to compensate the said Elizabeth for the injuries received. About the 26th day of March, 1876, the present plaintiff joined with his wife Elizabeth in an action against the city to recover damages on account of the injuries sustained by the wife, the present plaintiff making no claim in that action for loss of services of his wife, or for moneys expended by him for medical attend-

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ance or other expenses which he had necessarily incurred on account of her injuries. This last action was still pending and undetermined on the 15th of March, 1878, on which day the said Elizabeth Meese died. No proceedings have been had in that suit since the death of Elizabeth, and the present action was commenced on the 24th day of May, 1878.

"The city sets out in its answer the commencement of such former action, alleging that the same is still pending and undetermined, and prays that on account thereof this action be abated."

"Upon the trial, it was conceded that the present action was commenced subsequent to the death of Elizabeth Meese, and it was also admitted that an action had been previously commenced against the city to recover damages on account of the injuries sustained by Elizabeth, in which action the present plaintiff had joined as plaintiff with his wife; and it was also admitted that by the complaint in the former action the plaintiffs sought to recover for the damages which the wife had sustained by reason of her personal injuries, and that no claim was made on the part of the present plaintiff to recover for the loss of service of his wife, or for money which he had expended for medical attendance and nursing."

"Upon these facts the defendant insisted in the court below, and insists in this court, that the present action should have been abated."

Other facts appearing from the record are sufficiently stated in the opinion, *infra*.

There was a special verdict, upon which the court rendered judgment in plaintiff's favor for \$831 damages; and defendant appealed from the judgment.

For the appellant, there was a brief by *F. F. Duffy*, with *Wm. D. Conklin*, of counsel, and oral argument by *Mr. Conklin*. They argued that, under the provisions of chap. 96, Laws of 1873, it was competent for the plaintiff to claim in his complaint, and to recover in the former action pending for the

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same injury, all such damages as were sought to be recovered in this cause; that if there were no special allegations of loss of services and expenses incurred, in such complaint, plaintiff could prove them under the count for general damages, or could amend at any time; and therefore the refusal of the court to abate this action was error. Upon the question of damages, they contended that the proper rule was the legal, natural and proximate consequences of the act complained of; that such damages must be based upon proofs of positive services rendered, and the money values thereof, at and prior to the time of injury, and which were directly lost by defendant's negligence; and that the refusal of the court to submit for answer the question as to the value of the wife's services during the two years immediately preceding the accident, was equivalent to directing the jury to disregard the actual facts proven, and to estimate speculative, hypothetical and future values. *Vedder v. Hildreth*, 2 Wis., 427; *Brayton v. Chase*, 3 id., 456; *Ripon v. Bittel*, 30 id., 614; *Gear v. Shaw*, 1 Pin., 608; *Sedgw. on Damages*, 92 to 95, and cases there cited.

For the respondent, there was a brief by *Coleman & Spence*, and oral argument by *Mr. Spence*. They contended, 1. That the right of action in this case was entirely distinct from that in the former suit; that prior to ch. 96, Laws of 1873, the two causes of action could not be united, and it is not necessary they should be now; and that therefore the motion to abate was properly denied. *Shaddock v. Clifton*, 22 Wis., 114; *Kavanaugh v. Janesville*, 24 id., 618; *Hunt v. Winfield*, 36 id., 154. 2. That the testimony established the fact that plaintiff's wife, at the time of her injury, had almost, if not completely, recovered from her previous illness; and in view of such recovery, accomplished or at least reasonably to be expected, it was absurd to claim that the measure of damages was the value of her services during such sickness.

TAYLOR, J. The learned counsel for the appellant contends

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that chapter 96, Laws of 1873, now section 2680, R. S. 1878, is mandatory, and if the husband brings an action jointly with his wife to recover damages for an injury sustained by the wife, he must in such action claim his damages for loss of service of the wife, and his expenses for medical attendance, if he desires to recover damages on that account, or be barred from recovering the same; that he cannot maintain a separate action in his own name to recover for loss of service, etc., and at the same time maintain a joint action in the name of himself and wife for injuries to the wife, when both actions are founded upon the same negligent act or acts of the defendant.

As the damages in both cases, when recovered, belong to the husband, there is great force in the argument of the learned counsel, that since the statute has removed the technical objection which at common law prevented the joinder of the two causes of action in one suit, the court should construe this law as mandatory, and not permit the husband in such case to divide his causes of action, and thereby subject the defendant to the cost and expense of two defenses instead of one; that the act, being a remedial act, should be liberally construed to effect the purpose of its enactment, to wit, "to prevent a multiplicity of actions upon the same cause," as specified in the title thereof. As we are of the opinion that the evidence in the case shows that no other action was pending at the time the present one was commenced, it is unnecessary to determine the question whether a judgment in a joint action by the husband and wife, to recover damages for her personal injuries only, would be a bar to a subsequent action by the husband for loss of service, etc., arising out of the same negligence or default of the defendant, or whether the actual pendency of such joint action would be a good plea in abatement to such subsequent separate action by the husband.

It is conceded by the counsel for the respective parties, that the joint action by the husband and wife to recover damage for the personal injuries to the wife abated with her death.

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Such action abated at common law, and it is not saved to the husband by our statute. See section 4253; *Woodward v. Railway Co.*, 23 Wis., 400, 405-6; Schouler's Domestic Relations, 107-108; *Purple v. Railroad Co.*, 4 Duer, 74; *Hodgman v. Railroad Corp.*, 7 How. Pr., 492; *Butler v. Railroad Co.*, 22 Barb., 110; *Meech v. Stoner*, 19 N. Y., 26. It is clear, therefore, that the action brought by the plaintiff and his wife, in which the only damages claimed were damages for personal injuries to the wife, abated absolutely at the death of the wife, and could not be prosecuted further by the husband.

But it is urged by the learned counsel for the appellant, that the husband, notwithstanding the death of the wife, might in that action be permitted to amend his complaint, even after her death, so as to claim damages for loss of services, etc., and in that way continue such action against the defendant. It is, perhaps, a sufficient answer to this argument, that the plaintiff does not choose to amend the complaint in that action for that purpose, but chooses rather to permit it to remain abated and commence a new action for the recovery of such damages, as he has in this case. The first action, having abated absolutely as to the cause of action set forth in the complaint, is no more a pending action than though the plaintiff had voluntarily dismissed such action, or suffered a nonsuit; in either of which events the commencement of the former suit would not bar the present action, nor could it be pleaded in abatement as a former suit pending.

It is also urged by the learned counsel for the appellant, that the death of the wife does not of itself abate the action, but in order to get the cause out of court some further action or suggestion must be made therein by the husband or by the defendant. We are at a loss to see what action the husband could take in that case after the death of his wife. The fact of her death takes away all right of the husband to prosecute the same further. It is probable that, upon the sugges-

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tion of the death by the defendant, the court might enter a formal order declaring the action abated, or the same entry might be made on the suggestion of the husband. Such entry would, however, be nothing more than evidence of the fact that the action had abated, and not the abatement thereof. The abatement takes place by the death of the wife, and not by virtue of the record which evidences such death.

We think the evidence in this record fails to show that there was a former suit pending by the husband and wife, or either of them, at the time of the commencement of this action, and that the court decided rightly in refusing to dismiss the plaintiff's action for that reason.

The counsel for the appellant alleges as error, that the damages allowed for the loss of service of the wife are excessive. Upon this question the evidence was not, perhaps, of the most satisfactory nature; but there was certainly some evidence to sustain the amount of damages given by the jury. Although the evidence showed that for some years before the accident the plaintiff's wife had been an invalid, still the testimony of her physicians and others who knew her showed that her health at the time the accident occurred was improving, and strongly tended to show that the probabilities were that, had it not been for the injury then received, she would have been able in a short time to discharge the most important duties of a wife in her family. Upon this point the evidence was fairly submitted to the jury, and this court cannot say, from an inspection of the record, that they were not justified in assessing the damages at the sum fixed by them.

It is also insisted by the appellant, that the court erred in refusing to submit to the jury, as a part of the special verdict, the following question: "What, if anything, was the value of her services per month during the two years she had been an invalid next prior to the accident?" We are unable to see how an answer to this question would have enlightened the court as to the probable value of her services thereafter

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had not the accident happened. The evidence showed that during these past two years she had been, most of the time, an invalid; but, if we are to place any confidence in the testimony of her physician, she had been gradually recovering during this period, and the indications were that she would soon recover her health and strength. Evidence of the value of the services of a person during the period of a long and prostrating sickness would not tend to enlighten either the court or jury as to what such person's services would be worth for a like period of time on the hypothesis that he had recovered from such sickness. In this case the jury undoubtedly assessed the value of her service upon the theory that the evidence tended strongly to show that but for the accident she would have regained her health; and, as there was some evidence to support this theory, the finding upon that question is conclusive.

The objection that the question whether the negligence of the wife contributed to the accident, was not fairly submitted to the jury, we think is unfounded. By an examination of the questions submitted to the jury, it will be seen that the jury found that the defect in the bridge which occasioned the accident was not easily seen; that the defect had existed for five days; that the proper city officer had notice of the defect before the accident, and took no means to warn the public of the same; that the vehicle in which the plaintiff's wife was riding was a safe and proper one; that the horse was gentle, and driven by a boy fifteen years old, and she was in the exercise of ordinary care in being in and riding in the carriage in its then condition, with the number of passengers and with the boy driver, under the circumstances proven in the case. We think these findings fairly exculpate the plaintiff's wife from the guilt of contributory negligence, especially as the record does not contain any evidence tending to prove that either she or the boy driver were in any way negligent at the time the accident occurred.

Sable vs. Maloney.

After a careful examination of the record, we are unable to discover any error which would justify this court in reversing the judgment appealed from.

By the Court.—The judgment of the circuit court is affirmed.

SABLE vs. MALONEY.

January 9—February 3, 1880.

Reformation of Deed.

1. A written instrument will not be reformed on the ground of alleged mistake, unless the party complaining moves promptly after discovery of the mistake; nor then without clear proof.
2. In this case a judgment reforming a deed is reversed for *laches* in failing to bring suit until nearly fifteen years after both parties to the deed had knowledge of the alleged mistake; and also for the insufficiency of the evidence—the testimony of the parties to the deed (who appear to be equally credible) being in direct conflict, and neither being corroborated.

APPEAL from the Circuit Court for *Crawford* County.

Defendant appealed from a judgment reforming his deed of conveyance. The case will sufficiently appear from the opinion.

For the appellant, there was a brief by *Coleman & Spence*, and oral argument by *Mr. Spence*:

1. The plaintiff, a remote grantee of John Sable, is neither party nor privy to the deed sought to be reformed, and cannot maintain this action. *Cady v. Potter*, 55 Barb., 463; Story's Eq. Jur., § 165. 2. Prompt action is required of him who would relieve himself from a mistake, especially in the execution of formal instruments in writing under seal. Plaintiff and his grantor, by their *laches*, have lost any right they may once have had for reformation of the deed in question. *Willard's* Eq., 69; Story's Eq. Jur., § 1520; *Smith v. Clay*, Amb., 645. 3. The evidence of mistake is not clear and sat-

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75	426
48	331
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isfactory, and where such is the case equity will not reform. *Kent v. Lasley*, 24 Wis., 654; *McClellan v. Sanford*, 26 id., 595; *Harter v. Christoph*, 32 id., 245; *Newton v. Holley*, 6 id., 592; *Lake v. Meacham*, 13 id., 355; *Fowler v. Adams*, id., 458; *Harrison v. Juneau Bank*, 17 id., 340; *Shelburne v. Inchiquin*, 1 Bro. Ch., 347; *Motteux v. London Assurance Co.*, 1 Atk., 545; Story's Eq. Jur., §157.

A. M. Blair, for respondent.

ORTON, J. This is a complaint, in the nature of a bill in equity, to reform a covenant in a certain deed, of the grantee, the defendant, in respect to the building and maintaining of a gate on the north side of a certain strip of land granted for a private way, alleging a mistake in said covenant in designating the *south* instead of the north line, which latter line is claimed to be according to the agreement of the parties to the deed. The deed was executed in June, 1863, and, according to the testimony of the grantor himself, he was fully aware of such mistake and claimed that it should be corrected in the fall of the same year, and the grantee denied that such was a mistake and refused to have the same corrected. Until the year 1877 no further complaint was made of such mistake, and then only by the present plaintiff, who claims to hold the land under and to have succeeded to the rights of the grantor; and no gate was ever built on said north line, and this suit was commenced, *probably*, in the year 1878.

There is no transcript of the docket entries of the clerk of the circuit court, and no dates of filing of the summons, complaint or answer, in the record, to show the exact time when the suit was commenced; but we assume that it was commenced after the plaintiff first complained of the mistake, in 1877, and before the making up of the special issues for a jury, September 1, 1878. Here was a delay of about fifteen years, and a virtual acquiescence in the correctness of the covenant in the deed during that time.

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If the snit was not actually barred by the statute of limitations, there was an unreasonably long delay and great laches in its commencement, and so long a time had elapsed since the discovery of the pretended mistake, that the agreement in relation to the deed, and the circumstances connected with its execution, had been forgotten by the witnesses of the deed, and others present at its execution. On this point, the principle aptly quoted by the learned counsel of the appellant in his brief must be held to prevail in this case: "Prompt action, absence of dilatoriness, is required of him who would relieve himself from a mistake, especially in the execution of formal written instruments. To this class of cases the maxim '*vigilantibus non dormientibus jura subveniunt*' is peculiarly applicable." Willard's Eq. Jur., 69; Story's Eq. Jur., § 1520.

The language of this court in *Sheldon v. Rockwell et al.*, 9 Wis., 181, is equally applicable: "The court lends its aid only to the vigilant, active and faithful. This tardy application must be regarded as made in bad faith. After his gross and unparalleled negligence, the plaintiff can have no standing in court for the purpose of asking the relief here sought. Unreasonable delay and mere lapse of time, independently of any statute of limitations, constitute a defense in a court of equity."

We think, also, that the evidence of the mistake, given on the trial, was very unsatisfactory, and quite insufficient to warrant the circuit court to adjudge a reformation or correction of this deed, under the rule laid down by this court in *Kent v. Lasley et al.*, 24 Wis., 657: "The same and no less convincing proofs were required, than are necessary to authorize the reformation of a written contract on the ground of mistake. If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as the full and correct expression of the intent unless the contrary is established beyond reasonable controversy."

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The parties to the deed, who appear to be equally credible, are in direct conflict, and there was no other direct evidence nor any surrounding circumstances in corroboration of the testimony of the grantor of the deed.

By the Court. — The judgment of the circuit court is reversed, with costs, and the cause remanded with direction to the circuit court to dismiss the complaint.

SUSENGUTH VS. THE TOWN OF RANTOUL.

January 9—February 3, 1880.

TOWNS: Injuries from defective highway. (1) *Notice to town of claim.*
(2) *PLEADING: separate counts: what each must show.*

1. In an action against a town for injuries suffered in 1875 by reason of a defective highway, notice in writing to the town board, of the character defined in ch. 86 of the laws of that year, must be alleged.
2. The complaint, after averring injuries to plaintiff from a defective highway of the town, alleged as "another and further cause of action," that, "by reason of said injury so received as herein set forth," plaintiff was wholly unable to carry on a certain manufacturing business in which he had previously been engaged, and that he lost in consequence a large amount of trade, to his damage, etc. This count, not otherwise averring any defect in the highway, or that the injury was caused thereby, is *held* insufficient, on demurrer.

APPEAL from the Circuit Court for *Calumet* County.

Action for injuries received by plaintiff November 27, 1875, while traveling along a highway in the defendant town, and alleged to have been caused by the defective condition of the highway. After the usual allegations to show defendant's liability for the condition of the highway, the nature of the defect, and the circumstances of the accident, the complaint alleges that plaintiff was thereby greatly bruised and injured, rendered sick, lame and disabled, and wholly unfit to move or go about and attend to his business for more than seven months, and was rendered a cripple for life. The nature of

48	334
81	361
48	334
97	651

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plaintiff's business is then stated, and it is alleged that by reason of said injury he will always be prevented from conducting said business, or any other "requiring the use of his legs, and necessitating his traveling or moving about," to his damage \$5,000.

"For another and further cause of action," it is alleged that at the time of the accident plaintiff was, and for a long time had been, a manufacturer of soda water, spruce and root beer, etc., and had a large and lucrative business in their manufacture and sale in certain counties named; that for the purpose of said business he owned and operated a factory in a place named; that the manufacture and preparation of said articles required great skill on his part; that "by reason of the said injury so received as hereinbefore set forth," he was wholly unable to operate said factory, and was also unable to procure other persons skilled in the manufacture of said articles to operate it and supply his customers; that the factory therefore remained idle for seven months from the day of the accident, and his customers, or some of them, were supplied with said articles by other manufacturers; and that thereby plaintiff's said trade and business was greatly injured and diminished, to his damage \$1,000.

For a third cause of action, it is alleged that, by reason of "the said injury hereinbefore set forth," plaintiff was compelled to expend large sums of money for medicines, medical aid and other attendance, to his damage \$250. Judgment is accordingly demanded for the several sums above named, etc.

Defendant demurred separately to the second and third causes of action, for insufficiency of facts. The demurrers were overruled, and defendant appealed from the order.

For the appellant, there was a brief by *Coleman & Spence*, and oral argument by *Mr. Spence*.

The cause was submitted for the respondent on briefs of *J. E. McMullen*.

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COLE, J. The defendant demurred separately to the second and third causes of action set forth in the complaint, on the ground that each is insufficient in law. In the second count, or paragraph, the plaintiff claims damages which he alleges he has sustained in consequence of being unable personally to attend to and operate his factory for the preparation of soda water, spruce and root beer, and bottled cider, articles which he was largely engaged in manufacturing when he received the injury in the first count mentioned; and also for damages for loss of trade sustained by him by reason of not being able to supply his customers with these articles of drink. In the third count, he seeks to recover the expense incurred by him and money paid out during his sickness for medical aid and attendance and for medicines. A number of objections are taken to each count. It is said that the loss or damage stated in each does not of itself constitute a distinct cause of action, but is the natural and proximate result of the injury set forth in the first count, and should have been included in that cause of action, by way of special damage. Doubtless this method of alleging special damage resulting from a wrong is not usual, but it is not the most serious objection to these counts.

The gravamen of the action is plainly the injury which the plaintiff sustained through the negligence of the defendant town to keep its highway in repair. But neither count contains any averment that there was an insufficient highway in the town, which the town neglected to repair, and which caused the injury; nor is there any allegation that the matters set forth in the first count in that regard, are incorporated by reference in these counts, even if such a mode of pleading to help out a cause of action defectively stated, were allowable under the decisions in *Curtis v. Moore*, 15 Wis., 134; *Catlin v. Pedrick*, 17 Wis., 88; and *Sabin v. Austin*, 19 Wis., 421. But there is a still more serious objection to each of these counts. It is nowhere averred in either that notice of the

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injury was given the town authorities as required by chapter 86, Laws of 1875. The injury of which the plaintiff complains was received on or about the 27th of November, 1875, and of course this statute controls as to the remedy; and it is insisted by the defendant's counsel, that the giving of the required notice was essential to the right to maintain the action. This position, we think, is sound. This giving of the notice is, undoubtedly, in the nature of a condition precedent to the right to sue the town for damages; for the liability of the town for an injury occasioned by a defective highway is statutory, and it is undoubtedly competent for the legislature to regulate the remedy. It has done so by providing that no action, after this law took effect, should be had or maintained in any court in this state, against the town, for injuries received or damages sustained through the insufficiency or want of repair of any highway or bridge, *unless notice shall have first been given in writing* to one or more of the town board of supervisors of the town in which the highway or bridge is situated, by the person injured or claiming damages, within sixty days of the time of the occurrence of the injury or damage, stating the place where such injury or damage occurred, describing the insufficiency or want of repair which occasioned such injury or damage, and that he or she so injured or damaged will claim satisfaction of such town. If each count were otherwise good, it would be fatally defective for want of an averment that this notice was duly given before the action was commenced. See 40 Wis., 44; 46 Wis., 559 and 695.

The order overruling the demurrers to the second and third causes of action must therefore be reversed, and the cause remanded for further proceedings according to law.

By the Court. — So ordered.

 Warder and another vs. Fisher.

WARDER and another vs. FISHER.

January 10—February 3, 1880.

- (1, 2) SALE OF CHATTEL, *with warranty: Rights of the parties.*
 (3) COURT AND JURY. *Impeachment of witness: Erroneous instruction as to impeaching evidence.*

1. On a sale of a chattel, with a warranty express or implied, in the absence of fraud on the vendor's part, if the article is not as warranted, the purchaser may return or offer to return it within a reasonable time (where the time is not fixed by special contract), and thus defeat the vendor's right to recover any part of the price, or may keep it, and, in an action for the price, recoup damages for breach of the warranty; but in such action the vendor may recover the real value of the chattel, if any, notwithstanding its total unfitness *for the uses* for which it was purchased.
2. In an action for the price of a reaper, where plaintiff's evidence tended to show a sale with special warranty, and defendant's evidence tended to show that there was *no sale*, it was error to instruct the jury that, "if there was a contract of sale, and the machine was *wholly unfit for the uses for which it was constructed* and purchased, there was an entire failure of consideration, and defendant was not required to return or offer to return the machine or to pay for it."
3. The credit of a witness may be impeached by showing that he has made statements out of court contrary to his testimony at the trial; and where the testimony was so conflicting as to make the credibility of the witnesses important, and such impeaching evidence as to respondent's witnesses had been introduced by the appellant, it was error to instruct the jury that such evidence "is generally worthless to destroy the evidence of witnesses to facts."

APPEAL from the Circuit Court for *Crawford* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought by the plaintiffs to recover the value of a reaper which they allege the defendant purchased of them, and for which he agreed to pay the sum of \$145. The defendant by his answer denies that he ever purchased the reaper of the plaintiffs, and alleges that it was delivered to him by the plaintiffs on trial, with the agreement that if he was not satisfied with it they would take it away again; and

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that after trial he notified the plaintiffs that he was not satisfied with it, and requested them to take it away. Upon the trial, the evidence was very conflicting, the plaintiffs' witnesses testifying that the defendant made an absolute purchase of the machine for the agreed price of \$145, with a special warranty on the part of the plaintiffs that the machine should do good work; and that if, after notice to plaintiffs and an opportunity given to test the same by the plaintiffs or their agents, it did not then perform the work as warranted, the machine was to be returned to the plaintiffs, and the defendant released from all liability to pay for the same. The defendant and some of his witnesses testified that he did not purchase the machine, but took it on trial, to be returned if not satisfied with it; that he tried it, and it did not satisfy him; and that he notified the plaintiffs of the fact, and requested them to take it away. There was no evidence showing a breach of the special warranty in case the jury found from the evidence that the defendant purchased it with such warranty."

The instructions to the jury are sufficiently stated in the opinion, *infra*. There was a verdict for the defendant; a new trial was refused; and the plaintiffs appealed from a judgment on the verdict.

For the appellants, there was a brief by *Thomas & Muller*, and oral argument by *Mr. Thomas*.

Wm. H. Evans, for the respondent.

TAYLOR, J. The evidence being conflicting upon the principal issues in the case, it was important that the jury should be carefully instructed as to the rights of the parties under the two different theories of the case. The learned circuit judge very properly instructed the jury, that if they found in favor of the defendant's theory, that he took the machine upon trial, to be taken away by the plaintiffs if he was not satisfied with it, then there was no sale, and the plaintiffs

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could not recover. He also very properly instructed the jury, that if they found in favor of the plaintiffs' theory, that there was a sale with a warranty, "the defendant could not rescind the contract unless the machine was defective; if it was not what it was represented to be, he might return or offer to return it, and relieve himself from obligation." "If he purchased the machine by contract, and took it with a warranty, he was bound to comply with the terms of the warranty before he was entitled to rescind the contract."

The foregoing instructions were followed by the following: "If it was a contract of sale, and the machine was wholly unfit for the uses for which it was constructed and purchased, there was an entire failure of consideration, and the defendant in that case would not be required to return or offer to return the machine, and is not bound to pay for it." This instruction was excepted to by the plaintiffs, and it is insisted that it does not correctly state the law, and that it tended to mislead the jury to the prejudice of the plaintiffs. We think the learned circuit judge was mistaken in his legal proposition, and that the exception of the plaintiffs was well taken. The court had already charged the jury correctly, that, "if the defendant purchased the machine, and took it with a warranty, he was bound to comply with the terms of the warranty before he was entitled to rescind the contract." This instruction was applicable to the case made by the plaintiffs' evidence, that the sale was accompanied by a special warranty, which provided that such special warranty should be invalid and of no effect, "unless the machine is properly set up and operated as per our directions. If said machine does not perform as above [referring to the warranty], immediate notice must be given to Warder, Mitchell & Co., Chicago, Ill., subject to a second trial in their presence, when, if the failure is found not to have arisen from any defect in the machine, it shall be kept by the purchaser, and continued use shall be

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considered proof that it fills the warranty; but if, upon said second trial, said machine does not work as above, it may be returned to us, and the money will be refunded."

The case was properly submitted upon the claim of the plaintiffs that the sale was made with this special warranty, by the instructions first given by the learned judge; but the instruction to which exception was taken, submitted the case to the jury upon a wholly different theory, to wit: that if the defendant had in fact purchased the machine, no matter upon what terms or conditions, yet, if the jury found from the evidence that it was wholly unfit for the uses for which it was constructed and purchased, then the plaintiff could not recover, even though the defendant had not returned or offered to return it. We think the jury must have so understood the instruction, as the evidence does not show any sale, except the sale with the special warranty. The plaintiffs' evidence tends to prove the sale with such warranty, and no other, and the defendant's evidence that there was no sale. The jury must therefore have understood, that if there had been a purchase by the defendant with a special warranty, yet, if the machine proved on trial to be wholly unfit for the uses for which it was purchased, the special warranty might be disregarded by the defendant, and still he could defeat the plaintiffs' action without returning or offering to return the machine.

It seems to us that the instruction was inconsistent with the one just before given, as above quoted, and did not state the law correctly in stating that "if the machine was wholly unfit for the uses for which it was purchased, there was an entire failure of consideration." The true rule is, that in the case of the sale of chattels with a warranty expressed or implied, in the absence of fraud on the part of the vendor, if the thing purchased does not answer the terms of the warranty, the purchaser may return or offer to return the property within a reasonable time, and thereby defeat the right on the part of the vendor to recover any part of the purchase

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price agreed upon; or he may keep the property, and, when sued by the vendor for the price, may set up the breach of the warranty in recoupment of the plaintiff's damages; but in such action the vendor, notwithstanding the breach of warranty, may recover the value of the chattel — if it has any value,—notwithstanding its unfitness for the uses for which it was purchased. 2 Schouler's Personal Property, 610, 611; *Perley v. Balch*, 23 Pick., 284; Chitty on Contracts, 276; *Hunt v. Silk*, 5 East, 449; *Conner v. Henderson*, 15 Mass., 319; *Wynn v. Hiday*, 2 Blackf., 123; *Dill v. O'Ferrell*, 45 Ind., 268; *Poulton v. Lattimore*, 9 B. & C., 259; *Fairfield v. Madison Manuf'g Co.*, 38 Wis., 347; *Fisk v. Tank*, 12 Wis., 302; *Bonnell v. Jacobs*, 36 Wis., 59; *Merrill v. Nightingale*, 39 Wis., 247; *Morehouse v. Comstock*, 42 Wis., 626; *Getty v. Rountree*, 2 Pin., 379.

In order to rescind the contract so as to defeat the vendor's right of action, the purchaser must put the vendor, so far as he reasonably can, in the position he was in at the time of the sale; and that can be done only by returning or offering to return the property in a reasonable time. (See cases above cited.) If the vendor retains the property without any offer to return, he takes upon himself the burden of showing that the property purchased is entirely worthless, not only for the purposes for which it was purchased, but for every purpose. It may be true that, in an action by the vendor for the purchase price, the vendee might defeat his recovery by showing that he had sustained special damages by reason of the breach of warranty, which equalled or exceeded the value of the property purchased, notwithstanding the property was retained by him, and was of some value; but in such case he does not defeat the vendor's action by showing an entire failure of the consideration agreed to be paid for the article, but by showing that, notwithstanding the value of the property purchased and retained, he has sustained damage by reason of the breach of the warranty, to an amount exceeding such value. Under the

instruction given by the learned circuit judge, the jury would have been justified in finding for the defendant, notwithstanding he retained possession of the machine, and notwithstanding they might have found that the machine was of considerable value for other purposes than as a reaper.

It does not follow, because a machine or other personal chattel is wholly useless for the purposes for which it was made, that it is wholly valueless; and the vendee who retains the chattel purchased, without offer to return the same, can only have a perfect and full defense to the vendor's action for the price, when he is able to show that the article so purchased does not answer the purpose for which it was purchased, and that it is entirely valueless. If the article is of any value, either to himself or to the vendor, he must return or offer to return it, in order to make a full defense to the action for the price. We think the plaintiffs' exception to the instruction was well taken, and that the court erred in giving it to the jury.

There is another instruction which was given to the jury, and excepted to by the plaintiffs, which, we think, tended to prejudice the plaintiffs, and should not have been given. It is as follows: "With regard to the credibility of witnesses, you are to judge. It has been attempted to show that witnesses have made statements out of court different from those in court. Such evidence is generally worthless to destroy the evidence of witnesses to facts."

The contradictory nature of the evidence of the witnesses for the respective parties in this case rendered the question of their credibility of grave importance in the determination of the issues. It was hardly possible for the jury to reconcile their conflicting statements, and find that the witnesses were all truthful; and they were necessarily compelled to determine the issues in favor of the party whose witnesses, in their opinion, were entitled to the most credit. The record shows that as to the defendant and some of his witnesses the plaint-

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iffs proved that they had made statements in relation to the matters in issue, out of court and before the trial, different from those which they made under oath on the trial. That the credit of a witness may be impeached by showing that he has made statements out of court contrary to what he has testified to at the trial, has been admitted and acted upon by all courts from the earliest times, and it is unnecessary to cite authorities to sustain that practice. All text writers treat of it as one of the established methods of impeaching the credibility of the testimony of the witness. 1 Greenleaf's Evidence, § 462, and notes; *Ketchingman v. State*, 6 Wis., 426.

The unsworn statements of a mere witness in the case, given in evidence to impeach his credibility, are not received as evidence to prove either side of the issues in the case, but to cast doubt and suspicion upon the truthfulness of the contradictory statement made by the witness under oath; but when the witness who has made the contradictory statements out of court is also a party to the action, such unsworn statements are received, not only for the purpose of attacking the credibility of the sworn statements of the party, but for the purpose of establishing the truth of the unsworn contradictory statements themselves. In a case like the present, where it was impossible to reconcile the contradictory testimony of the opposing parties and their witnesses upon the theory that they were all testifying to the truth as they understood it, and where the jury must of necessity pass upon the credit of the opposing witnesses, it seems to us that the learned judge was not justified in instructing them, substantially, that proof of contradictory statements made out of court should have no weight with them in passing upon the credibility of their testimony. If the proof of such contradictory statements is to have no weight in determining the credit of a witness, the rule permitting their proof should be abolished, and thereby save the time which is unnecessarily wasted in proving them.

We think the rule is founded upon a just appreciation of

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the infirmities of human nature, and that the man who deliberately makes a statement relative to his business matters, when not under oath, and when under oath contradicts such statement, necessarily shakes our full confidence in the truth of such latter statement, and, unless a satisfactory reason be given (if one can be given) why the first false statement was made, the credibility of the witness so attacked is, to some extent, impeached, and whether he shall be believed or not is for the jury. It is not the duty or right of the court to say to the jury that such attack upon his credibility "is generally worthless to destroy his evidence."

The learned circuit judge erred in giving the instructions above mentioned; and, as they tended to mislead the jury to the prejudice of the plaintiffs, the judgment must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

 FOWLER and another vs. HUNT.

January 10 — February 3, 1880.

CHATTEL MORTGAGE. *Description of property.*

A chattel mortgage which described the mortgaged property as "the entire stock in trade and fixtures" of the mortgagee, "consisting of clocks, watches, chains, show cases, jewelry, and all goods included in his stock, tools and material, excepting one safe, one regulator . . . and stock in trade to the amount of two hundred dollars"—held void for uncertainty.

APPEAL from the Circuit Court for *Crawford* County.

The defendant as sheriff levied upon certain goods and chattels by virtue of executions against the property of one Wetzel, in whose possession the goods were found. Plaintiffs claimed a right to the possession of the property by virtue of a mortgage thereof executed by Wetzel to them about a month be-

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fore the seizure, to secure the payment of \$424, the purchase money of goods sold by them to Wetzel; which mortgage was filed in the proper clerk's office on the day of its execution. The answer averred, among other things, that the mortgage was in fraud of creditors, and that it did not cover the goods in dispute. The description of the property in the mortgage will appear from the opinion.

The plaintiffs had a verdict and judgment for the amount of the mortgage debt; and defendant appealed from the judgment.

For the appellant, there were separate briefs by *M. M. & D. Webster* and *Thomas & Fuller*, and oral argument by *Mr. Thomas*.

For the respondents, there was a brief by *Wm. H. Evans* and *Stoneman & Chapin*, and oral argument by *Mr. Evans*.

ORTON, J. The chattel mortgage on which the plaintiffs predicate their right to the property, the value of which they seek to recover in this action, was clearly void for uncertainty of description. The language of description is as follows: "The entire stock in trade and fixtures of the said William Wetzel, consisting of clocks, watches, chains, show cases, jewelry, and all goods included in his stock, tools and material, *excepting* one safe, one regulator, one astronomical clock, two musical clocks, *and stock in trade to the amount of two hundred dollars.*"

This exception leaves in the mortgagor a proportionate interest in each article mortgaged, as \$200 is to the whole value of the property, uncertain and unsevered, and which is unseverable and incommutable, except by some future act of the parties; or the mortgage leaves a right of future selection of *any* of the property to the mortgagor of the value of \$200, the residue of which can be ascertained only by such selection; and, in either view, such uncertainty of description renders the mortgage void.

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"In order to transfer the right of property in goods or chattels, the chattel intended to be conveyed must be ascertained and identified at the time of the execution of the instrument." Herman on Chat. Mort., § 38.

Where a mortgage is of property, and there is a larger quantity in the possession of the mortgagor than is specified in the description, and no *particular* description of the articles, otherwise than by their general class or number, nor any selection or delivery of the articles, nor any specification as to which are intended, out of a large lot of articles then on hand, such mortgage will be ineffectual to pass any title to any particular property, or to any interest in the property on hand. Herman on Chattel Mortgages, § 42; *Croswell v. Allis*, 25 Conn., 311; *Blakely v. Patrick*, 67 N. C., 40. So, when the exception to the things granted is, "such articles as are by law exempt from levy and sale under execution," and the exemption would apply as well to any of the articles named, the mortgage is void for uncertainty.

In such case the court, in *Newell v. Warner*, 44 Barb., 263, very properly said: "The articles attempted to be sold by the mortgage are all capable of being identified and distinguished by their physical attributes. But how many and which of them became the property of the plaintiff upon the execution and delivery of the mortgage? The instrument does not profess to convey *all*, but a *part* only. Which part does it *transfer*, and which *reserve*?"

The mortgage having been admitted in evidence in proof of the title of the plaintiffs to the property alleged to have been converted by the defendant, and against the objection of the defendant, the circuit court erred in a most material point.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial therein.

The State ex rel. Lanning and another vs. Lonsdale.

THE STATE ex rel. LANNING and another vs. LONSDALE.

January 10 — February 3, 1880.

PUNISHING RECUSANT WITNESS FOR CONTEMPT. (1) *Powers of court and commissioner respectively.* (2) *Application of sec. 4066, R. S.* (3) *Power of court to punish witness examined in another county.* (4) *Legislative power over punishment for contempt.* (5-9) AWARD OF INDEMNITY to injured party, in contempt proceedings. (5, 6) *General limitation of the power.* (7-9) *How far recusant witness liable under it.* (10) *Right of witness to refuse to answer.* (11) *What communications to Commercial Agency privileged.* (12) *Practice in contempt proceedings against recusant witness.*

- [1. *It seems that the mere fact that a court commissioner, taking testimony in a case pending in court, had power to punish for contempt in respect to such examination, would not deprive the court of jurisdiction to punish for such contempt on the commissioner's report thereof.*]
2. Sec. 4066, R. S., relating to the attachment of witnesses refusing to testify, etc., notwithstanding some general language therein, does not include the case of persons subpoenaed to depose in *judicial* proceedings pending in the courts, but relates exclusively to witnesses before municipal boards, or committees thereof, and other like bodies authorized to take testimony in other cases. A statement in *Stuart v. Allen*, 45 Wis., 158, *sub fine*, withdrawn.
3. Under sec. 3477, R. S. (as well as at the common law), the circuit court of any county may punish as for a criminal contempt persons subpoenaed to testify in actions pending in such court, before a court commissioner in *another county*, where such persons disobey the summons or refuse to be sworn or to answer.
- [4. While the power to punish for contempt was not conferred in the first instance by statute, but is inherent in the court, yet, when a statute prescribes the procedure in a prosecution for contempt, or limits the penalty, the statute controls.]
5. The power of the court in any case to award *indemnity* to an injured party, in a summary proceeding as for a contempt, rests entirely upon the statute.
6. The "loss or injury" for which the court may award compensation to the injured party in a proceeding as for a contempt, under secs. 3490-91, R. S. 1878 (secs. 21, 23, ch. 149, R. S. 1858), is a pecuniary loss or injury for which the party injured might recover damages by an action. *In re Ida Louisa Pierce*, 44 Wis., 411, as to this point, adhered to.

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7. While sec. 4063, R. S., gives or recognizes a right of action by the aggrieved party against one duly subpoenaed and under obligation to attend as a witness, who fails to attend without reasonable excuse, to recover damages caused by such failure, no such action will lie against a witness for a mere refusal to answer proper questions, at least without allegation and proof of some special loss or injury.
8. Where a witness is prosecuted and punished as for a criminal contempt, the relator in the proceeding cannot recover the expenses of the prosecution, in an action against him.
9. An order of the circuit court adjudged that defendant was in contempt for his refusal to answer proper questions upon his examination as a witness before a court commissioner, in an action pending in said court, and that such refusal was calculated to and did impede and prejudice the plaintiffs in said action in their rights and remedies therein, and that such plaintiffs had been put to a large amount of costs and expenses in such proceedings, to wit, a specified sum; and it thereupon adjudged that, instead of a fine, defendant pay plaintiffs said sum, and that he be committed to jail, and there remain charged with such contempt, until he should answer such questions and *pay said sum of money*, etc. *Held*, that the court had no authority to adjudge payment of indemnity to the plaintiffs in such a case, instead of imposing a fine.
10. When a witness refuses to answer a question on the ground that his answer might show him guilty of a misdemeanor and subject him to a penalty, the court must determine, under all the circumstances of the case, whether such is the tendency of the question, and whether the witness shall be required to answer.
11. A communication to a "Commercial Agency" from its local correspondent, as to the commercial standing of a person doing business in any place, is so far privileged in the hands of the persons conducting such agency, that they may lawfully make known its contents confidentially to their subscribers seeking information upon that subject; provided this is done without malice and in the belief that the statements are true.
12. The regular course of proceeding where an officer, taking the deposition of a witness to be used in an action pending in a court of record of this state, reports to such court that the witness has refused to answer interrogatories propounded to him — stated.

APPEAL from the Circuit Court for *Fond du Lac* County.

This is a proceeding against the appellant, *Lonsdale*, as for a contempt, to enforce a civil remedy. The alleged contempt consisted in the refusal of *Lonsdale* to answer certain interrogatories propounded to him when giving his deposition as a

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witness before a court commissioner of Milwaukee county, in an action pending in the circuit court for Fond du Lac county, in which the relators are plaintiffs and one Lewis E. Reed is defendant.

That action is to recover damages for an alleged libel contained in a letter which it is charged the defendant wrote, and sent to some commercial agency in the city of Milwaukee, giving an unfavorable report of the financial standing and responsibility of the relators.

Lonsdale was the managing agent of the commercial agency of R. G. Dun & Co., at Milwaukee, and, in obedience to a subpoena *duces tecum*, appeared before the commissioner to give his deposition in the action as a witness. The subpoena required him, among other things, to produce all letters and correspondence in his possession or under his control as manager of such agency, received at or by the agency from Reed, the defendant in the libel suit, relating to the financial standing or credit of the relators. On being interrogated in relation thereto, *Lonsdale* refused to disclose whether the agency had received any such communications from Reed, or whether Reed was one of the correspondents of the agency, and also refused, when requested so to do, to produce any correspondence or documents called for by the subpoena. The ground assigned for such refusals was, that his answers to the questions propounded would have a tendency to accuse himself of libel, which is a misdemeanor, or to expose him to a penalty.

The commissioner thereupon reported the above facts to the circuit court for Fond du Lac county. On such report, and an affidavit of one of the attorneys for the relators showing the facts above stated, the circuit court granted an order that *Lonsdale* show cause, on a day therein named, why he should not be adjudged guilty of a contempt by reason of the premises. *Lonsdale* appeared pursuant to the order, and admitted that the statements of fact in such report and affidavit were true. The court thereupon made the following order:

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"It is now here ordered and adjudged that said *John E. Lonsdale* has been and is guilty of the misconduct alleged against him in the proceedings and premises, and is guilty of contempt therein, and that the said misconduct was calculated to and did actually impede and prejudice the said plaintiffs, *Azariah* and *Alpheus Lanning*, in their rights and remedies in their said action against said *Lewis E. Reed*, defendant therein, and that the said *Azariah* and *Alpheus Lanning* have, by reason of said misconduct, been put to a great amount of costs and expenses, to wit, the sum of \$221.17. It is further ordered and adjudged that instead of a fine the said *John E. Lonsdale* pay to the plaintiffs the costs and expenses in such proceedings, amounting to the said sum of \$221.17, and that the payment thereof be and the same is hereby imposed on said *John E. Lonsdale* for his misconduct.

"It is further ordered that said *John E. Lonsdale* be, and he is hereby, directed to stand committed to the common jail of the county of Fond du Lac, there to remain, charged with said contempt, until he shall, on due notice to said plaintiffs' attorney, proceed and testify in said action (if pending), as a witness before said commissioner, this court, or some officer competent and authorized to take said testimony, and shall answer said questions, and comply with the said directions hereinbefore set forth, and until he shall fully pay the said sum of \$221.17 so imposed, costs and expenses of the proceedings, unless he shall sooner be discharged by the court; and that a warrant of commitment issue to carry this judgment into effect."

From the above order, *Lonsdale* appealed.

For the appellant, there were separate briefs by *David S. Ordway* and *H. M. Finch* in behalf of *Finches, Lynde & Miller*; and there was also oral argument by *Mr. Lynde* and *Mr. Ordway*. The argument of *Mr. Ordway's* brief is substantially as follows:

1. Under secs. 2434 and 4066, R. S., only the court commis-

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sioner before whom the appellant's deposition was taken had authority or jurisdiction to commit for the supposed contempt. Prior to the time when the present revision took effect, no such authority had been given to court commissioners; but that revision was intended to "give authority to officers taking depositions to punish for contempt as in New York." *Stuart v. Allen*, '45 Wis., 158. In New York, an order similar to that here in question was reversed on the ground that the officer before whom the witness was testifying should have committed, and not the court. *People ex rel. Valiente v. Dyckman*, 24 How. Pr., 223. True, the language of the statute is, that the officer "*may* by warrant commit;" but under this language he is *bound* to commit wherever the public or an individual has a claim *de jure* to have the power exercised. *Newburgh Turnp. Co. v. Miller*, 5 Johns. Ch., 113; *Kane v. Footh*, 70 Ill., 587; *Market Nat. Bk. v. Hogan*, 21 Wis., 318; *Cutler v. Howard*, 9 id., 312. True, also, the circuit court has an unquestionable power of review; but under this it merely affirms or vacates the commissioner's order of commitment. 2. There was no authority either in the court or the commissioner to commit the appellant to the jail of *Fond du Lac* county. Residing in Milwaukee county, more than thirty miles from the place of trial, he could not have been compelled to go to Fond du Lac county to testify, if he had offered to give his deposition. When he was examined before the commissioner in Milwaukee county, if the commissioner (whose proper office it was to punish him for any contempt) had committed him to the jail of that county, it is doubtful whether the circuit court of the same county, rather than that of Fond du Lac county, would not have had the power of review. But if that power belonged to the latter court, still it acquired thereby no right to make any order of commitment which the commissioner himself could not have made. Subd. 5, sec. 3477, R. S., in terms empowers the court to punish by fine and imprisonment "all persons

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summoned as witnesses," for refusing to obey the summons, or to be sworn, "or to answer as such witnesses;" but it is submitted that this refers only to witnesses who are within the jurisdiction of the court and are summoned before the court. In *State v. Brophy*, 38 Wis., 425, the question which county the sheriff could be imprisoned in was not raised. This is a *quasi* criminal proceeding; if any crime has been committed, it was committed in the county of Milwaukee; if any person has been treated with contempt, it is the commissioner; and if the proceeding were criminal *in form* under sec. 2565, R. S., only the commissioner would have the right to determine in the first instance whether the refusal was a contempt of his authority. In *re Eldred*, 46 Wis., 530.

3. The appellant had a right to decline answering the questions which he did refuse to answer. A witness cannot be required, in this state, "to give any answer which shall have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture." The appellant had testified that the reports made from their correspondents to the agency were *furnished by them to their subscribers*. It is a libel to publish falsely that a man is insolvent and unable to pay his debts. 2 Addison on Torts, 928-9; *Cox v. Lee*, L. R., 4 Exch., 284; *Sunderlin v. Bradstreet*, 46 N. Y., 188; *Taylor v. Church*, 8 id., 452. And, in general, all who are in any manner instrumental in making the defamatory publication or procuring it to be made, are jointly and severally responsible therefor. Cooley on Torts, 194; 3 Greenl. Ev., § 169; *Robinson v. Jones*, 9 Cent. L. J., 147; *Williamson v. Freer*, L. R., 9 C. P., 393-5; *Beardsley v. Tappan*, 5 Blatchf., 498. It is plain, therefore, that an answer to the questions put to the respondent *might* have exposed him to a criminal prosecution for libel under sec. 15, ch. 172, R. S. 1858. The constitution, indeed, provides that "in all criminal prosecutions for libel the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libellous is true, and

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was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." Art. I, sec. 3. But the court cannot in this proceeding determine whether the respondent, if subjected to a criminal prosecution, would be able to make out a defense to the satisfaction of the jury. True, if it affirmatively appears that the statute of limitations has run upon the offense, or that there is full statutory protection of the witness against prosecution, the privilege cannot be claimed; but that rule has no application here. And, "unless the court can see that the witness *will not* be criminated, the privilege will be recognized and protected." *Coburn v. Odell*, 10 Foster, 555; *Janvrin v. Scammon*, 9 id., 290; *People v. Mather*, 4 Wend., 254-7. Some courts hold that it is for the witness to state on his oath that he believes that an answer to the question will tend to criminate him, and that the statement is conclusive (*Fisher v. Ronalds*, 16 Eng. L. & E., 418, and note 1; *Osborne v. The London Dock Co.*, 29 id., 382; 74 E. C. L., 762); while other courts declare that it is the province of the court to judge. See *Warner v. Lucas*, 10 Ohio, 338; *In re Fernandez*, 10 C. B., N. S. (100 E. C. L.), 38; *Harrison v. Southcote*, 1 Atk., 539; *Cates v. Hardacre*, 3 Taunt., 423. The appellant in this case answered sufficiently far to show that further answers in the same direction might and probably would tend to convict him of libel. The general rule is, that the witness may claim the privilege at any stage of the inquiry, if the fact as to which he is interrogated forms a link in the chain of testimony upon which he might be convicted; and the exceptions found to that rule are inapplicable to this case. 1 Greenl. Ev. (13th ed.), § 451 and notes; Gresley's Eq. Ev., § 81 and notes; *Regina v. Garbett*, 2 Car. & K., 483 (61 E. C. L., 495); *Dandridge v. Corden*, 3 Car. & P., 11 (14 E. C. L., 185); *Rex v. Staney*, 5 id., 213 (24 E. C. L., 286); *Cartwright v. Green*, 8 Ves. (Sumn. ed.), 409 and note 1; *Claridge v. Hoare*, 14 id., 59 and note a;

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Paxton v. Douglas, 16 Ves., 242; *Short v. Mercier*, 1 Eng. L. & E., 212-15; 15 Jur., 93; *People v. Mather*, *supra*; *Bellinger v. The People*, 8 Wend., 597; *People v. McCoy*, 45 How. Pr., 216; *Byass v. Sullivan*, 21 id., 52; *In re Tappan v. Douglass*, 9 id., 394; 2 Barb., 224; *Bank of Salina v. Henry*, 2 Denio, 155, and 3 id., 593; *People v. Hackley*, 24 N. Y., 81; *Chamberlain v. Willson*, 12 Vt., 591; *State v. Wentworth*, 65 Me., 243; *Coburn v. Odell*, 10 Foster, 555; *State v. Foster*, 3 id., 354; *State v. K.*, 4 N. H., 562; *Amherst v. Hollis*, 9 N. H., 108; 10 Gray, 472; *Emery's Case*, 107 Mass., 173; 114 id., 286; *Maloney v. Bartley*, 3 Campb., 210; *French v. Venneman*, 14 Ind., 282; 4 Mich. (Gibbs), 423; *Re Graham*, 8 Benedict, 420. 4. The same reasons which excuse a witness from answering criminating questions protect him from being obliged to produce criminating documents. Starkie on Ev., 6th Am. ed., 87 and notes; id., 8th Am. ed., with notes by Sharswood, pp. 110-12; *Amey v. Long*, 9 East, 473, 485; *Bull v. Loveland*, 10 Pick., 14; *U. S. v. Reyburn*, 6 Pet., 367; *Byass v. Sullivan*, 21 How. Pr., 53; *U. S. v. Three Tons Coal*, 6 Biss., 379; *Bellinger v. The People*, *People v. Hackley*, and *In re Graham*, *supra*; 1 Greenl. Ev. (13th ed.), § 193 and notes. 5. The court will not punish a witness for contempt without evidence that the testimony refused is *material*, and such as the party is entitled by law to demand. *In re Judson*, 3 Blatchf., 151; 1 Greenl. Ev., § 319. The only libel charged in the complaint is alleged to have been contained in a report sent by one Reed "in the month of December, 1877;" and the only pertinent and proper question was, whether the witness had in his possession, or in the office of the mercantile agency, this particular report. No other would be competent evidence under the complaint. 1 Greenl. Ev., §§ 56-58, 63-65; 3 id., § 167; *Strader v. Snyder*, 67 Ill., 404; *Adams v. Kelly*, 21 E. C. L., 403; *Comm. v. Varney*, 10 Cush., 404; *Wolfe v. Goulard*, 15 Abb. Pr., 336. Courts do not favor mere fishing inquiries, such as this evidently

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was. *Morgan v. Morgan*, 16 Abb. Pr., N. S., 296. As the order appealed from directs imprisonment until *all* the questions are answered, it must be reversed if any one of them is incompetent, immaterial or criminating. 6. The report alleged in the complaint for libel to have been made to the commercial agency, was a privileged communication, having been communicated in strict privacy, in the course of a lawful employment, by a trusted agent, to his principal (*Ormsby v. Douglass*, 37 N. Y., 479; *Knowles v. Peck*, 42 Conn., 397); and for this reason, also, no answer to the questions propounded should have been required. *In re Judson*, *supra*. 7. The court, without attempting to impose any fine, exercised the power of requiring the appellant to pay the "costs and expenses of the proceeding" (R. S. 1858, ch. 149, sec. 22; R. S. 1878, sec. 3490); but in so doing it erred in allowing \$150 for counsel fees. It had no power to include under this head anything beyond the *taxable costs*. *Sudlow v. Knox*, 7 Abb. Pr., N. S., 419; *In re Jacobs*, 49 How. Pr., 372. As appears by the latter case, this error makes the whole commitment void.

The contentions in *Mr. Finch's* brief are, 1. That the complaint against Reed does not state a cause of action for want of proper averments either of malice or of special damages; and that all questions put to the witness were for that reason immaterial. 2. That the books and papers asked for belong to Dun & Co., who own the commercial agency. The appellant has no right to use them, except as he uses them in the business of Dun & Co. The clerk of a bank cannot be compelled to produce the books of the bank on subpoena; nor can the solicitor and secretary of a railway corporation be compelled to produce its books, when forbidden by the corporation. Moreover, Dun & Co. are not parties to this proceeding. The production of these books and papers may involve great trouble and loss to them; and before such production is ordered, they should have an opportunity to be heard. Their

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clerk should not be required to produce their books without their knowledge or consent. Nor should he be required to produce books which are not properly speaking under his control; and they are not under his control when the owner may forbid their removal or place them beyond the reach of the witness. And it is almost certain that the *subpoena duces tecum* would be no justification to the servant or employee for removing the books of his employer, when such employer is not a party to the suit. *Att'y Gen. v. Wilson*, 9 Simons, 526; *Lee v. Angas*, L. R., 2 Eq., 59; *Crowther v. Appleby*, L. R., 9 C. P., 23; *Airey v. Hall*, 12 Jur., 1043; *Bank of Utica v. Hillard*, 5 Cow., 158; *Opdyke v. Marble*, 18 Abb. Pr., 270.

3. That it is at least true that Dun & Co. can legally, at any time, dismiss this witness from their service, or remove these books and papers from his possession, and he will be powerless to produce them. And the order of commitment is therefore invalid because it requires the appellant to be confined until he shall perform an act thus out of his power. *Wartman v. Wartman*, Taney, 373.

4. That the order should also be reversed because it requires the production of all the reports with regard to the plaintiffs made during 1877, and is not confined to the report alleged in the complaint. *Stalker v. Gaunt*, 12 N. Y. Leg. Obs., 124; *France v. Lucy*, Ryan & M., 341; *Jones v. Edwards*, 1 McC. & Y., 139.

The cause was submitted for the respondents on briefs of *Markhams & Smith*:

1. The appellant's refusals to answer, etc., were properly certified to the circuit court for Fond du Lac county; and after a hearing upon its order to show cause (R. S., § 3480; *Poertner v. Russel*, 33 Wis., 193), that court, having adjudged the appellant guilty of the misconduct alleged, and that this impeded and prejudiced the remedies of the plaintiffs, had power to make the commitment. Sec. 4066, R. S., has no application to a court commissioner taking testimony in a case pending in court. But even if the commissioner had power

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to commit, under the statute, this would not deprive the court of that power. *Wickes v. Dresser*, 4 Abb. Pr., 93; *Kearney's Case*, 13 id., 459; *Hilton v. Patterson*, 18 id., 245; *People v. Brennan*, 45 Barb., 344; *Gould v. Dodge*, 30 Wis., 621; Const. of Wis., art. VII, sec. 8, and art. XIV, sec. 13; R. S., sec. 3477. That court had original jurisdiction in the libel suit, with power to issue all writs necessary to carry into effect its orders, judgments or decrees. Const., art. VII, sec. 8. It has general jurisdiction to commit for contempt a witness refusing to testify in an action or proceeding pending in the court (R. S., sec. 3477, subd. 5); and this though the evidence be not taken in the presence of the court. *Haight v. Lucia*, 36 Wis., 361; *State ex rel. Mann v. Brophy*, 38 id., 426; *Stuart v. Allen*, 45 id., 161; *Lee v. Dunlop*, 15 id., 391; *In re Remington*, 7 id., 643; *Giesse v. Beall*, 5 id., 229; *Nieuwankamp v. Ullman*, 47 id., 168. The jurisdiction of each circuit court is coëxtensive with the boundaries of the state, for the enforcement of its decrees or writs, and it requires no assistance from any other court. Its subpoena runs to any part of the state, and it may punish a disregard thereof as a contempt. Jurisdiction of a particular controversy is the power to hear and determine it; and when one is charged with violating the decree of a court, no other court than the one which rendered the decree can hear and determine the controversy or punish the contempt. *Phillips v. Welch*, 12 Nev., 158; *Shattuck v. The State*, 51 Miss., 50; *Wickes v. Dresser*, *supra*. In *State v. Brophy*, *supra*, the court of one county punished the sheriff of another county for contempt for acts done in the sheriff's own county, in a case pending in such court. If a witness may be subpoenaed from any portion of the state to appear before the circuit court for a given county (R. S., sec. 4053), certainly, in case he refuses to attend, the court must have power to bring him before it and punish his disobedience; and in such case there is no legal reason why he may not be committed to the jail of the county in

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which the court sits. R. S., sec. 4945. 2. Sec. 3490, R. S., provides for imposing upon the person in contempt payment to the injured party of a sum sufficient "to indemnify him, and to satisfy his costs *and expenses*." It has repeatedly been held that even when there is no other actual loss proved than costs and expenses of the proceeding, these should be paid. *Doubleday v. Sherman*, 8 Blatchf., 45. And there was no error in including \$150 for the fees of plaintiffs' counsel, for arguing the order to show cause, etc. The intimation in *Sudlow v. Knox*, 4 Abb. Dec., 326, cited to the contrary, is a mere dictum, and is at least inapplicable to the laws of this state. What is sought to be given is actual indemnity for all the expenses actually resulting to the relator from the defendant's misconduct; and this must include any sum which the relator's counsel could recover of him for services in the proceeding. See *Downing v. Marshall*, 37 N. Y., 380. Where do our statutes itemize or specify any costs for attorney's fees, except where, in an action at law, judgment is rendered in favor of the successful party for a fixed sum on an issue duly found? In a *quasi* criminal proceeding like this, there is no specific statutory provision for expenses of any kind; and, unless allowed by way of indemnity, nothing can be recovered. *Crocker v. Supervisors*, 35 Wis., 286. A proceeding for contempt is entirely distinct from the action in which the contempt was committed; as much so as an indictment for perjury is from the cause in which the perjury was committed. *Re Williamson*, 26 Pa. St., 9. And even if the "costs" are to be determined by reference to the statutory fee bill of officers, how does this satisfy the provision for all "expenses?" *People v. Crompton*, 1 Duer, 512; *Davis v. Sturtevant*, 4 id., 148; *S. C.*, 5 Seld., 263; *Doubleday v. Sherman*, 8 Blatchf., 45; *Ross v. Clusman*, 3 Sandf. S. O., 683; *Thompson v. Taylor*, 72 N. Y., 32; *Gear v. Shaw*, 1 Pin., 608; *Bonesteel v. Bonesteel*, 30 Wis., 511; 6 Wait's Pr., 155. 3. The order will not be reversed on the ground that the unanswered ques-

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tions were immaterial. (1) The objection is taken here for the first time, and is not assigned for error. *Cottrill v. Cramer*, 46 Wis., 488. (2) It was for the court, and not for the witness, to determine the materiality of the questions. (3) In 3 Blatchf., 151, there was no evidence before the court that there was any issue whatever in the case, and no information as to the nature of the controversy or the contents of the pleadings. Greenleaf (vol. 1, § 319) merely states that "if it appears that the testimony of the witness *could not have been* material, a rule for an attachment will not be granted;" and this is the extent of the decision in *Dicas v. Lawson*, 1 Crompt., M. & R., 933. There is no ground for assuming in this case that the evidence sought was wholly immaterial. The questions were all proper ones, either because the answers might have been directly material, or because they were a proper introduction or inducement to material questions. 2 Evans's Pothier, 296; *Johnston v. Hamburger*, 13 Wis., 175. It is no objection that the questions and the *subpœna duces tecum* were not limited to a single report made by Reed in December, 1877. In a civil action for a libel, time is not an essential averment, and a variance in that respect is not fatal. Townshend on Libel, § 376; *Richardson v. Roberts*, 23 Ga., 215; *Wright v. Britton*, 1 Morris (Iowa), 286. Other libels than those set out in the complaint are also admissible to show express malice. Townshend, § 394. 4. The objection that the appellant is a mere clerk and not the owner of the books, was not made by him, and he cannot be heard here to insist on rights not strictly personal and claimed in the court below. Starkie on Ev. (Sharswood's ed.), 110-11; *Chaplain v. Briscoe*, 5 Sm. & M., 198. Besides, his testimony showed that he was not a mere clerk, but the sole representative of the agency in this state. The court was the judge of the reasonableness of his excuse. *Bull v. Loveland*, 10 Pick., 14. It was admitted that the books were under his control and in his possession; and in such case he must ordinarily produce

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them in obedience to the subpoena. *Amey v. Long*, 9 East, 473; *Corsen v. Dubois*, 1 Holt's N. P., 239. When examined and declining to produce the papers, he may still be compelled to give general evidence of their contents. *Starkie*, 112; *Earl of Falmouth v. Moss*, 11 Price, 455; *Lynde v. Judd*, 3 Day, 499; *Durkee v. Leland*, 4 Vt., 612. The only exceptions recognized by the authorities are inapplicable here. *Starkie*, 111; 1 Greenl., 12th ed., § 558, note 4. 5. The witness's claim of privilege at the time of his examination seems to have been based upon the idea that the reports made to the agency were *confidential*. But the question whether a particular writing is privileged can be settled only by its production in court. *Wright v. Woodgate*, 2 Crompt., M. & R., 573. It might show malice on its face. 4 Wait's A. & D., 304-5. 6. Three weeks after his first refusal, the witness objected that compliance with the order of the commissioner would tend "to accuse him of a crime or misdemeanor." But having voluntarily testified to the existence of the agency, his own connection therewith, the reports and communications from their agents, etc., it was then too late to refuse to state the source of his knowledge, of what the reports consisted, and from whom they came. A witness who has answered in part, stating facts which the court can see may tend to convict him of crime, cannot then refuse to answer as to other facts of the same nature which may equally tend to criminate. *The State v. K.*, 4 N. H., 562; *Amherst v. Hollis*, 9 id., 107; *State v. Foster*, 3 Fost., 348; *Coburn v. Odell*, 10 id., 540; *Chamberlain v. Willson*, 12 Vt., 491; *Low v. Mitchell*, 18 Me., 374; *Norfolk v. Gaylord*, 28 Conn., 309; *Foster v. Pierce*, 11 Cush., 437, 439; *People v. Lohman*, 2 Barb., 216; 1 Greenl. Ev., § 451, 451 a, and cases there cited. 7. It is for the court to determine whether, under all the circumstances of the case, the question will call for a criminating answer, and whether the witness shall be required to answer. 1 Greenl. Ev., as last above cited; Stephen's Dig. of the

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Law of Ev., 137; 1 Burr's Trial, 245; 2 G. Greene (Iowa), 532; 2 Cow. Tr. (ed. of 1844), 444. And under all the circumstances of this case the court properly determined that the questions in this case, and the records called for, did not tend to criminate the witness. (1) The court might well doubt the good faith of the witness in making the objection so long after his refusal on a different ground, and then only on the advice of counsel, and without any declaration under oath. (2) If a production of the records should show that the agency had received a report such as is alleged in the complaint against Reed, this would not prove that the witness had given it further circulation. (3) Where the information given to a commercial agency is strictly confidential, and the information relating to one subscriber is communicated in good faith to other subscribers only, such communication is regarded as privileged, and is protected from the presumption of malice. *Ormsby v. Douglass*, 37 N. Y., 477, 480; *Flemming v. Newton*, 1 H. of L. Cas., 363; *Comm. v. Stacy*, 3 Phil. Leg. Gaz., 13; *Toogood v. Spyring*, 1 C., M. & R., 181. And the court cannot be asked to presume that the appellant, in a criminal prosecution against him for libel, will be shown to have acted in bad faith and with express malice; especially in view of his own clear evidence in this case to the contrary. *Stowell v. Eldred*, 26 Wis., 509; *Norris v. Denton*, 2 Cal., 378. Besides, after the witness had claimed privilege, and had been required by the court to answer, his answers, being compulsory, could not be used against him to convict him of a criminal charge. 1 Greenl. Ev., § 451; *Regina v. Garbett*, 2 C. & K., 474.

LYON, J. 1. The first question to be determined is, Has the circuit court for Fond du Lac county jurisdiction to punish the appellant for contempt, because of his refusal, when giving his deposition, to answer the interrogatories put to him, and to produce the correspondence required of him? Counsel for the appellant assert that the court commissioner taking the

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deposition has power, under section 4066, R. S., to punish him for the alleged contempt, and they maintain that the jurisdiction to do so is exclusive.

If it be conceded that the power to punish for the contempt is conferred upon the commissioner, we are by no means satisfied that the same power may not be exercised by the court in which the action wherein the deposition was taken is pending, provided the commissioner, instead of punishing for the contempt, reports the facts to the court. But the view we take of the statute renders a determination of that point unnecessary.

Section 4066 reads as follows: "If any person, duly subpoenaed and obliged to attend as a witness before any officer, arbitrators, board, committee, or other person authorized to examine witnesses or hear testimony, shall without any reasonable excuse fail to attend or to testify, as lawfully required, or to produce a book or paper which he was lawfully directed to bring by subpoena, or subscribe his deposition when correctly reduced to writing, upon sufficient proof of the facts by affidavit, any judge of a court of record, or court commissioner in the county, may issue an attachment to bring such witness before him, and then, unless such witness shall purge the contempt and go and testify, or do such other act as required by law, may by warrant commit him to the common jail of the county, there to remain in close confinement until he shall so testify, or do such act, or be discharged by order of such judge or commissioner, or according to law."

In their note to this section the revisers say that it is "section 2, ch. 125, 1860, condensed." Turning to the act of 1860, we find that its provisions relate exclusively to witnesses and testimony in proceedings before municipal boards or bodies, or before committees appointed by them, and have no application whatever to witnesses or testimony in actions or proceedings pending in the courts.

The language of section 4066, although quite general,

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furnishes support to the revisers' note: "If a person duly subpoenaed and obliged to attend as a witness before any *officer, arbitrator, board, committee*, or other person authorized to examine witnesses or hear testimony," shall fail to attend or testify, etc. No judicial tribunal or officer is here named, and the section contains no express mention of testimony taken to be used in a judicial proceeding in the courts. Moreover, the section confers jurisdiction upon a judge of a court of record, or a court commissioner, to attach the witness, only "upon sufficient proof of the facts by affidavit." This clearly contemplates a contempt committed in a proceeding before some tribunal or some person other than the judge or commissioner before whom the attachment proceedings are instituted. Had the legislature intended the section to include contempts by witnesses summoned to give depositions in judicial proceedings pending in our own courts, in view of the fact that such depositions are very frequently taken before court commissioners, it is fair to presume that the power to attach a contumacious witness would have been expressly given to the commissioner taking the deposition. It must be remembered that this is a penal statute, and, for that reason, must be strictly construed. Hence, notwithstanding some general words contained in it, as "officer," "other person," "deposition," and the like, it must be held that a judge or commissioner is not therein authorized to attach and punish a witness giving a deposition before him for refusing to answer proper interrogatories, if the deposition is being taken in a cause pending in a court of record of this state. A court commissioner is, however, authorized by statute (R. S., sec. 2433) to issue process of attachment to compel the attendance of witnesses who have been duly subpoenaed, in all cases in which he is authorized to take the depositions of such witnesses.

It should here be said that when the case of *Stuart v. Allen*, 45 Wis., 158, was decided, we all supposed that the late revision confers the power upon court commissioners to

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punish for contempt in cases like this. Hence the statement to that effect at the close of the opinion. More careful consideration has satisfied us that we were in error. We are inclined to think that section 4109, R. S., operates to extend the provisions of section 4066 to proceedings against a witness summoned to give his deposition in a cause depending in another state or country, who refuses to answer all proper interrogatories. The law which compels the citizens of this state to give testimony in such cases is founded in comity; and such testimony is, so to speak, extra-judicial as to our courts. A witness who unlawfully refuses to testify in a foreign cause, although he violates a penal law and is liable to punishment therefor, commits no contempt of any court of this state. But inasmuch as the effect of section 4109 is not involved in this case, although we have thought best to suggest a construction of it, we do not definitely determine the proper procedure to enforce its provisions.

It is further maintained that, the alleged offense having been committed in Milwaukee county, the appellant cannot lawfully be punished therefor in Fond du Lac county. We think the position untenable. It is provided by statute that "every court of record shall have power to punish by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in an action or proceeding depending in such court, or triable therein, may be defeated, impaired, impeded or prejudiced, in the following cases: . . . 5. All persons summoned as witnesses or garnishees, for refusing or neglecting to obey such summons, or to attend, or to be sworn, or to answer as such witnesses or garnishees." R. S., §80, sec. 3477.

The refusal of the appellant to answer the interrogatories propounded to him, and to produce the required correspondence, may have impeded or prejudiced the relators in obtaining their rights and enforcing their lawful remedies in their action pending in the circuit court for Fond du Lac county

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against Reed. If the interrogatories were proper, or if the correspondence should have been produced, such a refusal was in contempt, not of the authority of the commissioner, or any tribunal in Milwaukee county, but of the authority of the circuit court for Fond du Lac county. The commissioner was acting for that court, was engaged in the discharge of its functions; and the offense of the appellant, if he was guilty of an offense, consisted in contemning its authority by obstructing a regular and orderly proceeding in an action pending in that court. We think that county lines have no significance in such a case, but that the court wherein the action is pending may lawfully take action upon the report of the commissioner, and make such order in the premises as will vindicate the authority of the court and protect the rights of suitors therein, no matter in what county of the state the offense was committed. This is our reading of the statutes on the subject; and, in the absence of statutory provisions, we cannot doubt the court would have the same power under well established common-law principles.

2. We next proceed to inquire whether the order from which this appeal is taken is authorized by law. The order does not purport to impose punishment for a criminal contempt, but it gives indemnity to the relators by way of damages for injury or loss produced by the alleged misconduct of the appellant. Its validity depends upon sections 3490 and 3491 of the late revision, which are the same as sections 21 and 23, ch. 149, R. S. 1858. Unless the order can be sustained under these sections, it is irregular. For, whatever view may be taken of the inherent power to inflict criminal punishment for contempts, independently of the statute, it will not be claimed that the court may, without the authority of the statute, award indemnity to an injured party in a summary proceeding as for a contempt.

The construction and scope of the above sections were determined by this court, upon much deliberation, in *Re Ida*

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Louisa Pierce, 44 Wis., 411. In the opinion in that proceeding, it is said of those sections: "It is very clear that the 'loss or injury' of the statute is a pecuniary loss, or injury to rights for which compensation may be made in money; a loss or injury which would entitle the injured party to maintain an action against the offender to recover damages for his misconduct. This is made apparent by the last clause of section 21, which renders the payment of the indemnity a bar to such an action." The court adheres to the construction which it there gave to the statutes concerning contempts; and while it freely concedes, what it never questioned or doubted, that the power to punish for contempt was not conferred in the first instance by statute, but inheres in the court, it holds that whenever a statute prescribes the procedure in a prosecution for contempt, or limits the penalty, the statute controls.

The question arises, therefore, Can the relators maintain an action against the appellant to recover damages resulting from his refusal to answer the interrogatories put to him, and to produce the required correspondence?

Section 4063, R. S., gives, or at least recognizes, a right of action by the aggrieved party against a person duly subpoenaed as a witness and obliged to attend, who fails to do so without reasonable excuse, to recover the damages occasioned by such failure. But neither the statute nor any adjudged case that has come to our notice, recognizes such right of action against a witness for refusal to answer proper questions. It may be, however, that in special cases such an action can be maintained on common-law principles. But it seems to us it can only be maintained (if at all) for some special damage resulting from the unlawful refusal of the witness to testify. For example, such refusal might compel a party to take a continuance on terms. The continuance costs would probably be the measure of damages. If such an action can be maintained in any case, we think the recovery will be limited to the actual, direct, tangible damages; and that the mere refusal to testify, unac-

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accompanied by such damages, is not a ground of action. And we think, also, that no recovery can be had in such an action, based upon the possibility or probability that, had the witness testified fully, the judgment would have been more favorable to the aggrieved party than it was. Such damages are altogether too uncertain and conjectural to furnish a ground of action.

In this proceeding it does not appear that the relators suffered any special pecuniary loss or injury by reason of the alleged misconduct of the appellant. The order gives them indemnity only to the extent of their expenses in prosecuting the contempt proceedings. Had the proceeding resulted in punishment for a criminal contempt, it seems certain that the relators could not recover such expenses in an action against the appellant.

In whatever aspect we view the case, we are unable to find in it any feature which brings it within the statute authorizing the court in such proceedings to adjudge indemnity to the aggrieved party instead of imposing a fine upon the offender. We must hold, therefore, that the order is unauthorized by law, and for that reason it must be reversed.

3. The ground upon which the appellant refused to answer was, that his answers might tend to accuse him of crime and subject him to a penalty; that is to say, they might tend to show that he had been guilty of publishing or circulating a libelous document, which is a misdemeanor. The rule of law on this subject was stated by DIXON, C. J., in *Kirschner v. The State*, 9 Wis., 140, as follows: "Although the witness is the judge of the effect of his answer, and is not bound to disclose any facts or circumstances to show how the answer would affect him, as that would defeat the rule and destroy the protection afforded by the law, yet the court is to determine, under all the circumstances of the case, whether such is the tendency of the question put to him, and whether he shall be required to answer; as otherwise it would be in the power of

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every witness to deprive parties of the benefit of his testimony by a merely colorable pretense that his answers to questions would have a tendency to implicate him in some crime or misdemeanor, or would expose him to a penalty or forfeiture, when it is clear, as we think it was in this case, that the questions have no such tendency.”

We do not think it proper to pass definitely upon the character of the communication which is charged to be libelous, or to say whether or how far it is privileged as respects Mr. Reed. These are questions which should regularly be determined in the libel suit. For the purposes of this appeal we are inclined to think that it was conditionally privileged in the hands of the appellant or his principals, and that they might lawfully make known its contents confidentially to their subscribers seeking information of the financial standing of the relators, provided they did so in good faith—that is, without malice and in the belief that the statements therein contained were true.

There is nothing in the record before us tending to show that the appellant has made known the contents of this communication to any person other than the subscribers of the agency; and the fidelity with which he has guarded and kept the secrets of the agency in this proceeding is strong evidence that he has not. In order to hold that the answers of the appellant (provided he answers that he has the communication charged to have been made by Reed to the agency, and produces it) will or may tend to expose him to a criminal charge, we must assume that he has made an improper use of the communication. We do not perceive how we can so assume on this record, when there is not the slightest evidence of the fact, and when all reasonable probabilities are against it.

It is not deemed necessary to enlarge on this subject, because another effort to obtain the required testimony may disclose an entirely different state of facts.

4. It is deemed advisable to state briefly what we regard

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the proper practice in cases of this kind, and the statement will disclose another irregularity in this proceeding.

When the officer taking the deposition of a witness to be used in an action pending in a court of record of this state, reports to the court in which such action is pending, that the witness has refused to answer certain interrogatories propounded to him, the court should, on application of the aggrieved party, grant an order that the witness show cause why he should not be required to answer such interrogatories. On the return of the order, if the witness does not admit his refusal to answer, proper interrogatories in that behalf should be served upon him. If it appear by his admission, or by his answer to the interrogatories, or by proof, that he has so refused, the court will decide whether he ought to answer the questions which he has refused to answer; and if it is held that he ought, the court will make an order requiring him to go before the officer and make answer thereto; and in such case the court in its discretion may impose upon him the costs of the proceeding. For disobedience to such order the court should, on proper proceedings, punish the witness as for a criminal contempt.

The practice here indicated prevails in courts of equity, and does not seem to contravene the provisions of any statute. It is also eminently just to the witness. *Bradshaw v. Bradshaw*, 1 Russ. & Mylne, 358; 2 Dan. Ch. Pl. & Pr., 891, and cases cited; *Stuart v. Allen*, 45 Wis., 158.

Other questions were argued by counsel, but we do not find it necessary to determine them. Those already determined are decisive of this appeal.

By the Court. — Order reversed.

Bean vs. Loftus.

BEAN VS. LOFTUS.

*January 12—February 3, 1880.*EXECUTION: (1) *Officer claiming under, must show valid judgment.*(3) *Form of execution: when it runs in the name of the state.*REVERSAL OF JUDGMENT. (2) *When error will not reverse.*

1. In an action against an officer who has seized chattels on an execution, by one who claims by previous purchase from the execution defendant, the officer must show the execution to be based on a *valid* judgment, before he can dispute the validity of the alleged purchase on the ground that it was fraudulent as against creditors.
2. Where the judgment record produced by such officer to sustain his defense shows that the court which rendered the execution judgment had never obtained jurisdiction of the defendant therein, a judgment against the officer must be affirmed here, although rendered on a different and erroneous ground, and although the bill of exceptions, made upon the appeal of such officer, does not bring up for review the exception taken to the admission of such evidence.
3. The execution, after the venue, began: "To the sheriff or any constable of said county, greeting:" but in the body thereof the command to levy was given "in the name of the state of Wisconsin." *Held*, sufficient in form.

APPEAL from the Circuit Court for *Crawford* County.

Replevin. Answer, that the defendant took the goods as constable, under an execution in favor of one C. L. Ingersoll against the property of one Harry M. Bean; that the goods belonged in fact to said execution defendant; and that the pretended bill of sale from him to the plaintiff, *John Bean*, was fraudulent and void as to creditors.

The evidence introduced by defendant is sufficiently stated in the opinion. The plaintiff had a verdict and judgment; and defendant appealed.

For the appellant, there was a brief by *M. M. & D. Webster* and *J. T. & Geo. Mills*, and oral argument by *J. T. Mills*.

For the respondent, there was a brief by *Thomas & Fuller*, and oral argument by *Mr. Thomas*.

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COLE, J. The underlying principle which controls this case, is clearly stated by DIXON, C. J., in *Bogert v. Phelps*, 14 Wis., 89-92, in nearly this language: "In case of an action against the officer by the party against whom process is issued, the process itself, being valid on its face, constitutes a complete justification. But in case of suit by another person, claiming title to the property seized under the party against whom process issued, which title is contested on the ground of fraud, the officer must, in addition to showing that he acted under such process, show also that he acted for or on behalf of a creditor. Where he acts under process of execution, this is done by producing the judgment on which it is issued. If it be mesne process, then the debt must be proven by other competent evidence. This proof, however, is required not because it affects the process, or is in that respect necessary to protect the officer, but because it affects the title to the property in question. No one but a creditor can question the title of the fraudulent vendee; and hence the officer must show that the relation of debtor and creditor exists between the party against whom the attachment or execution ran and the person in whose behalf it was issued. It is a necessary link in the chain of evidence by which the fraud is to be established."

Now, applying these remarks to the present case, it will be seen that it was essential for the defendant to show that he stood in the place of or represented a creditor of the fraudulent vendor; in other words, it was incumbent on him to prove a valid judgment upon which his execution issued, in order to establish his defense. This was a necessary part of his case. In his answer, he states that he levied upon the property in controversy by virtue of an execution in favor of C. L. Ingersoll, and against one Harry M. Bean, who, he claimed, was the real owner of the property. If he had shown a valid judgment in that action, then it is obvious he would have been in a position — representing as he would a creditor — to attack the sale from Harry M. Bean to the plaintiff as fraudulent and void.

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But, until he established the fact that he represented a creditor of Harry M. Bean, he could not question the title of the fraudulent vendee. The defendant did attempt to prove a valid judgment rendered by Justice McDill in favor of Ingersoll, and against H. M. Bean. He offered in evidence, as a part of his case, certified copies of the original summons, return of service, and the docket entries of the justice in the cause. This evidence clearly disproved the existence of a valid judgment. It showed that the justice never acquired jurisdiction of the person of the defendant in that action; and for that reason the judgment was void. It was not claimed by the able and ingenious counsel who argued the cause here for the defendant, that there was any legal service of summons on Bean in the Ingersoll suit. Indeed, the return of the officer plainly shows there was none. But the counsel says that the plaintiff cannot avail himself of that objection on this appeal, because he has not himself made out a bill of exceptions. But it seems to us that the plaintiff may insist here that the defendant, on the trial below, proved himself out of court by showing that the execution under which he justified the taking of the property afforded no protection, since it affirmatively appeared that the judgment on which it was issued was void.

It is true that H. M. Bean, who was a witness for the plaintiff on the trial, testified, on cross examination, that he confessed the Ingersoll judgment. But it would be an unwarranted inference, in the face of the docket entries, to conclude that the witness meant by this that he appeared before the justice and confessed judgment when it was rendered; for among the docket entries of the justice is this: "Oct. 7th, 1876, 1 p. m. Cause called; plaintiff answers; no answer by defendant." This entry would certainly be untrue if the defendant actually appeared before the justice and confessed judgment. What the witness probably intended to say, was, that he did not contest, or that he admitted, the justice of the Ingersoll judgment; not that he appeared in court and confessed it.

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The case of *Grace v. Mitchell et al.*, 31 Wis., 533, was much relied on by counsel for the defendant, in support of the proposition that process fair on its face is a protection to the officer, even when it is issued by a court or officer of restricted or limited jurisdiction. In certain cases such process doubtless will afford complete protection to the officer. This is the doctrine of the early case of *Sprague v. Birchard*, 1 Wis., 458. In *Grace v. Mitchell* the action was by the garnishee against the officer and judgment creditor. There the officer doubtless would have been protected by his execution, which was valid on its face, had he not received notice *aliunde* that the judgment upon which it was issued was void for want of jurisdiction. But that case is quite dissimilar to this, where it was necessary for the defendant, under his answer, to show that the relation of debtor and creditor existed between H. M. Bean and C. L. Ingersoll in order to be in a position to avoid the sale from Bean to the plaintiff. And, as we have said, he attempted to show this relation by proof of a judgment between these parties, which he himself impeached. There was no such question in the *Grace* case.

The court below excluded the execution under which the defendant justified, because it did not run in the name of the state of Wisconsin. We do not think that objection to the writ well taken. Inasmuch as it appeared that the execution issued upon a void judgment, there was no error in excluding it, under the circumstances. Had the defendant shown a valid judgment, it should then have been admitted.

By the Court.—The judgment of the circuit court is affirmed.

Schultz vs. The Chicago, Milwaukee & St. Paul R'y Co.

SCHULTZ VS. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY.

January 12 — February 3, 1880.

RAILROADS. (1) *When company liable for injury to employee from negligence.*

SPECIAL VERDICT. (2) *Waiver of objection.*

EXCESSIVE DAMAGES. (3) *Defendant's right to new trial in case of excessive damages.* (4) *Damages awarded in this case held not excessive.*

1. Prior to ch. 173 of 1875 plaintiff was injured by a defective pile-driver while in the employ of the defendant company as one of a crew engaged in working such machine under L., defendant's foreman in charge of the driver, who had full authority to have it repaired when out of repair, and to hire and discharge the crew, and who knew that the machine was in a dangerous condition, in time to have it repaired before the injury. *Held*, that the foreman's negligence was the negligence of the defendant, and rendered it liable for the injury. *Brabbitts v. Railway Co.*, 38 Wis., 289.
2. Where defendant demanded generally, in due time, a special verdict (under R. S., sec. 2858), and the court thereupon submitted to the jury, for a special verdict, one only of several questions of fact involved in the issue and upon which there was conflicting evidence, and submitted the other questions for a general verdict upon proper instructions, and defendant, excepting to the particular question so specially submitted, and to the general instructions, did not specifically object to the failure of the court to submit other questions for special answers: *Held*, that the objection was *waired*.
3. In case of a verdict for excessive damages, where the jury appear not to have been influenced by prejudice, passion or bias, a new trial may be granted, unless plaintiff remit the excess; but the court should not require plaintiff to remit a portion of the damages, and at the same time deprive defendant of the benefit of the reduction unless he shall submit to onerous terms; as by directing judgment to be entered for plaintiff for the whole amount of the verdict upon his filing a stipulation that if defendant shall, within sixty days, pay him a certain smaller sum, with the costs, he will enter a full satisfaction of the judgment.
4. In view of the plaintiff's age and business at the time of the injury here in question, his previous ability to earn money by his labor, the permanent disablement of his right hand by the accident, and the pain and suffering endured, this court does not find in a verdict for \$4,500 such evidence of passion or prejudice in the jury as would warrant a reversal for excessive damages.

48	375
74	17
48	375
78	95

48	375
82	311

48	375
88	419

48	375
92	300

48	375
93	433

48	375
102	226
103	329

48	375
54	108n

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APPEAL from the Circuit Court for *Crawford* County.

This case was here on a former appeal, and the statement of it, which will be found in 40 Wis., 589, will not be repeated here. On that appeal a judgment for the plaintiff was reversed because the question whether he was in the service of the defendant company when injured, or of John Lawler, was not submitted to the jury.

On the retrial of the action, the testimony was very similar to that introduced on the first trial, with the exception that plaintiff testified that he made no contract with Mr. Lawler; that he considered himself in the service of the company, and should have looked to the company for his wages, had not Lawler paid him; and that, although his name was on Lawler's pay-roll, he received nothing from him for his work on the bridge, until after he was injured. Lawler testified that he made no contract with the men operating the pile-driver, but with the company only, and that he paid the men directly instead of paying the company for their services, because by so doing they received their wages a month earlier. Mr. Bennett, the head carpenter of the company, who had control of Mr. Loomis, the foreman, testified that the crew of the pile-driver were not discharged, but were only turned over to Mr. Lawler to do some work.

It also appeared that the men employed on the pile-driver, including the plaintiff, were hired by Loomis, the foreman in charge of it, and that he had power to discharge them. The evidence tends to prove that Loomis knew that the pile-driver was out of repair and in a dangerous condition, in time to have had it repaired before plaintiff was injured.

At the close of the testimony, counsel for defendant requested the court "to direct the jury to find a special verdict in this case." Whereupon the court submitted to the jury the question: "Was the plaintiff in the employ of the defendant at the time of the injury?" The court also charged the jury, among other things, as follows: "You will answer

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this question by writing under it Yes, or No. If you write and find No, you will say: We, the jury, find for the defendant. If you write Yes, you will then inquire whether the defendant was in fault; if you find that defendant was not in fault, you will find for the defendant. If you find that the plaintiff was negligent and in fault, you will find for the defendant. If you find that the defendant was in fault because of not using ordinary care and diligence in keeping in repair its machinery, and the plaintiff was not in fault, you will find for the plaintiff such damages as you think, from the proof, that he has sustained: *provided* you answer that you think plaintiff was in the employment of the defendant. If the plaintiff was in the employment of John Lawler, the defendant is not liable for the injury complained of by plaintiff." Defendant's counsel excepted to the special question propounded to the jury, and, generally, to that portion of the charge above quoted, save the last sentence thereof. The jury returned an affirmative answer to the special question, and a general verdict for the plaintiff, assessing his damages at \$4,500.

A motion for a new trial was made on behalf of the defendant, and the record discloses the following proceedings upon the motion:

"The said court did orally state that it would overrule the said motion to set aside the said verdict and for a new trial, and did further determine that the amount of the verdict of the jury herein was excessive; and the said court would sign judgment herein upon the following conditions only, to wit: That the plaintiff, in ten days from the time of signing judgment herein, file, in the office of the clerk of this court, a stipulation to the effect that, in case the defendant shall within sixty days from the time of signing said judgment pay to the plaintiff the sum of \$3,000, together with the costs of this action, said plaintiff would satisfy said judgment in full."

The required stipulation was filed, and judgment was there-

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upon entered for the plaintiff for the full amount of the damages assessed by the jury, and for costs. The defendant failed to comply with the conditions of such oral order and the stipulation filed pursuant thereto, and appealed from the judgment.

For the appellant, there was a brief by *Melbert B. Cary*, of counsel, and oral argument by *Mr. Cary* and *O. B. Thomas*.

For the respondent, there was a brief by *Hazelton & Provis*, and oral argument by *Mr. Provis* and *J. T. Mills*.

LYON, J. We think there is sufficient evidence in the case to support findings by the jury that the plaintiff was in the service of the defendant company when injured; that the pile-driver was in a dangerous condition at that time, and had been so to the knowledge of Loomis, the foreman, long enough for him to have had it repaired before the accident; and that the plaintiff was not guilty of any negligence contributing to cause the injury.

The evidence upon all of these propositions is conflicting, and it was peculiarly the province of the jury to determine, as to each, which way it preponderated. In returning a general verdict for the plaintiff, the jury necessarily found such propositions proved. Because there is evidence to support them, so far as the judgment rests upon them we cannot disturb it for defect of proof.

This brings us to consider the various rulings and proceedings upon which error is assigned:

1. A special verdict was demanded at the proper time on behalf of the defendant. Regularly, it thereupon became the duty of the court to submit to the jury questions of fact in writing, covering all of the material issues in the case upon which there was any conflict of evidence. R. S., 760, sec. 2858; *Hutchinson v. Railway Co.*, 41 Wis., 541. The court thus submitted a single question, to wit, whether the plaintiff, when injured, was in the service of defendant, and failed to

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submit specially other material controverted questions of fact in issue in the case.

Counsel for defendant objected generally to the question submitted, and to a portion of the charge of the court. But no specific objection was made or exception taken to the failure of the court to submit questions covering all of the issues. The court attempted to comply with the statute. The objection only informed the court that counsel thought the question submitted an improper one. No suggestion was made that counsel thought or desired that other questions should be submitted. All other issues were in fact submitted to the jury in the general charge, and we are unable to discover any erroneous statement of the law therein.

It seems to us that under such circumstances it was the duty of counsel then and there to make the specific objection that the question submitted was not the only one in issue, and that they desired a special submission of other issues. Failing to do so, but standing by during the whole proceeding without objection or exception reaching to the irregularity, we think, and so hold, that they waived the irregularity, and cannot afterwards be heard to complain of it. Any other rule would or might render the statute giving the right to a special verdict an instrument of wrong and injustice.

2. The plaintiff received the injuries of which he complains, before the enactment of chapter 173, Laws of 1875; hence, the question whether such a case is within the provisions of that act, is not involved. The right to maintain the action depends entirely upon common-law principles.

The principles which underlie this action are thus stated in *Brabbits v. Railway Co.*, 38 Wis., 289: "It is now too well settled to admit of controversy, that a master is not liable to his servant for injuries caused by the negligence of a fellow servant in the same general employment or business. It is just as well settled that, under certain circumstances, the whole power and authority of the master is vested in an employee

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or servant, in which case the negligence of such employee is the negligence of the master. This occurs most frequently when the master is a corporation aggregate, and can only perform its functions by agents or servants.

It is a verity in this case, made so by the special finding of the jury, that the plaintiff, when injured, was in the service of the defendant company. The evidence which established this fact, applies equally to Loomis, the foreman. The evidence is undisputed that Loomis was authorized by the company to employ men to work on the pile-driver, and to discharge them. It was also his duty to have the pile-driver repaired when any portion of it was out of repair or unsafe. This power and duty manifestly existed while he and the plaintiff were doing Lawler's work. Lawler testified, in substance, that had either proved unsatisfactory he would have reported them to the company to be taken away; and Loomis testified that, when doing Lawler's work, he was left on the machine as foreman; and that, although he received his instructions from Lawler, he had the management of it without interference from any one.

The above facts are mentioned for the purpose of pointing out the distinction between this case and the case of *Rourke v. The White Moss Colliery Co.*, 1 L. R., C. P. Div., 556, to which attention was called in the opinion on the former appeal.

The facts in that case are thus stated by the Lord Chief Justice COLERIDGE: "The defendants are the proprietors of a coal mine, and had been sinking a shaft themselves; but ultimately they entered into a contract with one Whittle to continue the work. The plaintiff, who up to that time had been employed by the defendants, then became the servant of Whittle, and was paid wages by him. The injury sustained by the plaintiff arose from the negligence of one Lawrence, an engineer appointed by the defendants to work a steam engine, which, under the contract with Whittle, was provided by the

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defendants to facilitate the work. Lawrence, though employed and paid by the defendants, was with the engine placed under the sole orders and control of Whittle." The negligence which caused the injury was that Lawrence fell asleep at his post.

The only question in the case was, whether Lawrence was the servant of Whittle; and it was held that in the matter of operating the engine he was; and hence, being a fellow servant with the plaintiff, there could be no recovery for the injury caused by his negligence. It is not claimed that the engine was in an unsafe condition.

In the present case, had Loomis and the plaintiff both been the servants of Lawler, had the pile-driver been in proper condition, and had the plaintiff been injured by the negligence of Loomis in operating it, we should have a case more nearly like *Rourke v. The Colliery Co.* It seems to us that this case in its essential particulars is like the case of *Brabbitt v. The Railway Co., supra*, and should be ruled by it. It was a duty which the defendant owed the plaintiff, to keep the pile-driver in proper repair. The defendant entrusted that duty to Loomis. By the rule established in that case, the negligence of Loomis in that behalf was the negligence of the defendant, for the consequences of which it is liable to respond in damages.

3. The learned circuit judge denied the motion for a new trial, but stated that he thought the damages assessed by the jury excessive; and he declined to sign judgment for the sum so assessed until the plaintiff stipulated to discharge the judgment if the defendant should, within sixty days after the judgment should be signed, pay thereon the sum of \$3,000, together with the costs.

If the trial court is of the opinion that the jury in a cause have assessed the damages at too large a sum, and yet thinks they have not been influenced by prejudice, passion or bias, a new trial may be granted, unless the plaintiff will remit a

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specified portion of the damages so assessed, and denied if he does remit the same. But if the court thinks that the excessive award of damages was the result of such improper influences, and not merely an error of fair, impartial judgment, the verdict should be set aside absolutely, and a new trial granted. Manifestly, in such a case, the vicious influences which prompted an excessive award poisons the whole verdict, and can only be counteracted by setting the verdict aside and sending the case to an impartial jury for trial.

But we are aware of no law or rule of practice which authorizes the court to impose the terms here imposed as a condition precedent to signing judgment. The court may grant or refuse a new trial, or, in a proper case, may grant a new trial *nisi*; but should do one thing or the other. It should not, as was done in this case, require the prevailing party to remit a portion of the damage awarded, and then deprive the other party of the benefit of the reduction unless he submits to onerous terms. Had this defendant paid the \$3,000 and costs, and taken a discharge of the judgment, probably it would thereby have lost the right to have the case reviewed by this court on appeal.

It was argued that because the circuit court thought the damages awarded by the jury were excessive, this court must so regard them. There might be more force in the argument if the record disclosed whether the court below thought the assessment was the result of passion or prejudice, or merely an error of fair and impartial judgment. The fact that judgment was rendered for the whole sum awarded tends to show that the court took the latter view, because, had it discovered evidences of vicious influences in the verdict, undoubtedly it would have set it aside at once. All the reasonable probabilities are that the court was of the opinion that the jury were moved by no wrong influences, but that they dispensed damages too liberally.

But, however that may be, we are clear that this court must

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consider the question whether the damages are excessive as an original question, uncontrolled by the opinion of the learned circuit judge.

The fact that larger damages are awarded than the court would give, were it to assess them, is not of itself sufficient to justify a reversal of the judgment. Before the court can interfere, it must find in the verdict evidence of partiality, passion or improper bias or prejudice on the part of the jury. *Karasich v. Hasbrouck*, 28 Wis., 569, and cases cited.

The plaintiff is a laborer, and when injured was thirty years of age and was earning two dollars per day. The injury has resulted in materially and permanently impairing the use of his right hand and his ability to earn a livelihood. In such cases the courts will very seldom disturb the award of damages—perhaps never unless it is manifest that the award is grossly excessive. *Duffy v. Railway Co.*, 34 Wis., 188, and cases cited. The subject is quite fully considered in the latter case, and it is unnecessary to repeat the discussion here.

Considering the age and business of the plaintiff, his previous ability to earn money by his labor, the serious nature of the injury—the permanent disablement of his right hand,—and the pain and suffering he endured, we are constrained to say, as was said in *Karasich v. Hasbrouck*, *supra*, that “although it must be conceded that the jury dispensed damages with a liberal hand, yet we fail to find in their verdict such evidences of partiality, passion or improper bias or prejudice, as will authorize us to interfere and set the verdict aside as excessive.” p. 577.

The foregoing observations seem to cover the whole case, and lead to an affirmance of the judgment.

By the Court.—Judgment affirmed.

 Fairbank and another vs. Newton.

FAIRBANK and another vs. NEWTON.

February 3, 1880.

Costs in Supreme Court.

48	384
111	360
111	361

Where no direction is given to the clerk of this court *when a case is decided*, in respect to the taxation for printing cases and briefs, he will tax for such disbursements according to the rules on the subject of taxation, without undertaking to determine whether the cases and briefs conform to the rules of this court in respect to such papers; and a taxation so made in this case, is affirmed.

APPEAL from the Circuit Court for *Dodge County*.

The judgment of the circuit court in this cause was reversed at the January term, 1879, of this court, and the cause remanded for further proceedings. 46 Wis., 644. Afterwards the respondents appealed from the taxation of costs in this court.

Eli Hooker, for respondents.

S. U. Pinney, for appellant.

COLE, J. This is an appeal from the taxation of costs by the clerk. It was objected on the taxation by the clerk, that the appellant should not be allowed costs for printing the entire case and briefs, because they were unnecessarily voluminous. It is said that the case and brief might have been condensed into comparatively few pages, and would have been, had the rules of this court in regard to the preparation of cases and briefs been observed by appellant's counsel.

In some instances, where this court thought there was a plain disregard of the rules in respect to the printing of cases and briefs, direction has been given to the clerk in the opinion, as to the taxation of costs for the printing. When this case was decided, no such direction was given, and we therefore think the clerk properly taxed the costs in favor of the appellant for printing the case and brief. For, in the absence of a

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direction by the court, it is obvious it would impose upon the clerk the performance of a most difficult and perplexing duty to require him to examine a case and brief, and determine whether they had been prepared according to the rules. Indeed, it would be quite impossible for the clerk intelligently to do this. The members of this court, who have to examine the cases and briefs, can better tell whether the rules have been disregarded in their preparation or not. So, in all cases where no direction is given to the clerk when the case is decided, in respect to the taxation for printing cases and briefs, he will tax for such disbursements according to his established rules.

By the Court.—The taxation by the clerk is affirmed.

JONES, Administrator, and others vs. THE UNITED STATES.

August 19, 1879 — February 3, 1880.

FEDERAL AND STATE LAWS: FLOWAGE OF LAND by Fox and Wisconsin River Improvement. (1-5) *Taking of land by United States: Recovery of damages in state courts pursuant to federal and state legislation.* (6) *Effect of proof that the injury is partly caused by another dam.*

1. Under the act of congress of March 3, 1875, and sec. 2, ch. 291 of the general laws of Wisconsin for 1874, compensation may be recovered for lands flowed by the Fox and Wisconsin River Improvement; and the amount of such compensation may be ascertained by proceedings in the courts of this state as provided by ch. 119 of the laws of this state of 1872, in respect to lands taken by railroad companies.
2. The fact that in the judicial proceedings in the state courts in such cases the United States is the nominal defendant, does not render the state act invalid; because the act of congress authorizes the compensation to be ascertained "in the mode provided by the laws of the state;" the whole proceeding is in fact one by which the general government enforces its condemnation of the land; and that government has the right to sue in the local courts, and is suable there *with its own consent*.
3. The act of congress in question is not liable to the objection that it attempts to delegate to the state tribunals the power of the general government to condemn land.

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48	385
76	284

48	385
59	LRA 828n
59	LRA 906n

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4. The act of congress authorizes the ascertainment of damages in the manner above indicated, in case of lands flowed either *before* or after the passage of the act by works *previously* or subsequently constructed, where compensation for such flowage *was then* or should thereafter become legally owing, if, "in the opinion of the officer in charge, it is not prudent that the dam or dams be lowered." *Held*, that this contemplates not a mere *expression of opinion* by the officer in charge, but such final and conclusive action of the United States, by such officer, as would constitute a legal release of all present and future right to maintain the dam as previously maintained; and even such relinquishment will not prevent a recovery for *past* damages.
5. The damages in such cases should include all past damages to the land, caused by the improvement, within the period of statutory limitation.
6. In an action for flowage of land by a dam, the fact that another dam contributes to some extent to produce the flowage complained of, is no defense. *Arimond v. G. B. & M. Canal Co.*, 35 Wis., 51; *Pumpelly v. The G. B. Company*, 13 Wall., 166.

APPEAL from the Circuit Court for *Fond du Lac* County.

On the 21st of April, 1875, the plaintiffs, *Frank L. Jones*, administrator of the estate of George J. Pumpelly, deceased, *James K. Pumpelly* and *Edwin C. Gray*, filed in the office of the clerk of said circuit court a petition, duly verified, addressed to the Hon. CAMPBELL McLEAN, judge of the fourth judicial circuit of Wisconsin, asking him to appoint three commissioners of appraisal pursuant to ch. 119 of the general laws of this state for 1872, and the amendments thereto, for the appraisal of certain lands in said petition described, and of the damages occasioned to said lands by the dam owned by the *United States of America* across the north channel of the outlet of Lake Winnebago, in Winnebago county in this state. The petitioners represented that they were the owners and occupants of said lands, and had been so for many years then last past; that the dam caused great injury to the lands by causing the waters of Lake Winnebago to set back upon, flow and soak the same; that no compensation had ever been made for such injuries; that the dam had been maintained by the Fox and Wisconsin Improvement Company and the Green

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Bay and Mississippi Canal Company, corporations organized under the laws of Wisconsin for the purpose of improving the Fox and Wisconsin rivers; that the *United States* had succeeded to the title and possession of the improvement, and its locks and dams, of which the dam above mentioned was one; that by an act of the legislature of Wisconsin, approved March 12, 1874 [ch. 291 of 1874], the government of the *United States* was authorized to condemn real estate and property necessary to be taken for the purpose of such improvement; that by an act of congress approved March 3, 1875 [ch. 166, U. S. Stats. of 1875], it was, amongst other things, enacted that in case of the flowage or injury of any lands or other property "by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained" in the mode provided by the laws of the state in which such property lies; that said dam cannot be maintained without continuance of such injuries to said lands; and that by said act of congress, and also by an act of congress of June 23, 1874, an appropriation was made to the amount of \$800,000 for carrying on and completing said improvement, of which sum \$50,000 was authorized to be appropriated for the payment of damages for property taken and damaged by reason of the construction and maintenance of said works of improvement.

After the filing of said petition, and after due notice to the attorney for the *United States*, the judge appointed three commissioners to appraise the damage alleged to have been sustained by the plaintiffs; and the commissioners, after a hearing, awarded damages to the plaintiffs in the sum of \$8,000. Both parties appealed from the award; and the cause came on for trial at the November term of the circuit court for Fond du Lac county. Before the impaneling of the jury, defendant

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objected to the jurisdiction of the court, on the grounds, 1. That the court had no jurisdiction of defendant's person. 2. That the court has no jurisdiction to try a case in which the *United States* is a party. 3. That the act of congress of March 3, 1875 [said ch. 166], is unconstitutional in that it assumes to confer upon a state court authority to try a case in which the *United States* is a party. The objection was overruled.

At the close of the evidence, the court instructed the jury at defendant's request: 1. That if the dam across the north channel or outlet of Lake Winnebago, at *Menasha*, was constructed, and plaintiffs' lands flowed and injured or destroyed by reason of the dam raising the water in the lake, more than twenty years prior to the filing of the petition in this action, the action was barred. 2. That unless said dam was the property of the defendant and maintained by it, plaintiffs could not recover. 3. That it appeared from the uncontradicted evidence that the dam across the *south* channel or outlet of Lake Winnebago, at *Neeenah*, was built, and continued to be owned and maintained, wholly by private parties for hydraulic purposes. 4. That if plaintiffs' lands were flowed, and so injured or destroyed, from natural causes, and not in consequence of the construction of the dam at *Menasha*, plaintiffs could not recover. 5. That if plaintiffs' said lands were damaged by reason of the construction of the dam at *Menasha*, and defendant was liable therefor, the jury should ascertain what benefits, if any, had accrued to plaintiffs' adjoining lands in consequence of the improvement of the Fox and Wisconsin rivers, and their verdict should be only for the *excess* of the damages above such benefits.

The court refused to give instructions asked by defendant, substantially as follows: 1. That plaintiffs could not recover unless it appeared affirmatively that in the opinion of the officer in charge of the improvement of the Fox and Wisconsin rivers, it was not prudent that the dam here in question

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should be lowered. 2. That plaintiffs could not recover unless the jury found that if the dam at *Neenah* had never been constructed, the one here in question would have caused the flowage of plaintiffs' lands. 3. That if the other issues of fact were found for the plaintiffs, the measure of their damages was the value of their said lands at the time the same were submerged or injured, with interest on that sum. 4. That if the lands described in the petition were flowed or injured by the construction of the dam in question, prior to the purchase of said lands by the plaintiff *Gray*, to the same extent as at the time of the filing of the petition, there was a misjoinder of plaintiffs, and no recovery could be had in this action. 5. That plaintiffs could not recover by reason of the nonjoinder of certain heirs-at-law of George J. Pumpelly, deceased, as parties plaintiff.

The following instructions given by the court in its general charge were excepted to by the defendant: 1. That if it appeared from the evidence that, in the prosecution or maintenance of the improvement of the Fox and Wisconsin rivers, the lands specified in the plaintiffs' petition were, on the 3d of March, 1875, and had since been, flowed or injured by means of the dam in question, and that compensation for such injury was on that day legally owing, and in the opinion of the officer in charge it was not prudent that the dam or dams causing such injury should be lowered, then this proceeding was lawfully instituted; and that if the jury were satisfied from the evidence that said lands described in the petition were and continued to be injured as set forth in the petition, the plaintiffs were entitled to recover in this proceeding. 2. That if the jury should find for the plaintiffs, the measure of their damages was the aggregate of the following items: (1) The depreciated value of the use of the land by means of the injuries thereto from soakage and flowage occasioned by said dam, down to the time when they should "find that the lands were taken by means of such flowage," not exceeding

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six years before the filing of the petition. (2) The value of the land so flowed at the time they should find they were so taken, with interest on the last named sum to the time of the verdict.

There was a verdict in favor of the plaintiffs, for \$10,000 damages; a new trial was refused; and, from a judgment in accordance with the verdict, the defendant appealed.

O. B. Thomas, for appellant:

1. The provision of art. V of the constitution of the United States, declaring that private property shall not be taken for public use without just compensation, is not only a *limitation* of the exercise of the power by the government, but is also by implication a *grant* of power to take upon making compensation. *Barron v. Baltimore*, 7 Peters, 243; *Kohl v. United States*, 91 U. S., 372. This implied grant is vested exclusively in the government of the United States, and its exercise by any other sovereignty for that government is prohibited as completely as though such prohibition had been expressed in words. So, the similar provision in our state constitution is a grant of power which applies to this state alone, and can be exercised only by this state for its own public use. The powers which the constitution defines, limits and apportions, must necessarily be exercised within the sovereignty which creates it, and prohibition of their exercise elsewhere would be a mere idle formality. The constitution of this state does not declare that our criminal laws shall not apply to offenses committed within the limits of a sister state; yet an enactment that they should so apply would be void. *Trombley v. Humphrey*, 23 Mich., 481. If it be claimed, however, that this right existed before the constitution as an essential attribute of sovereignty, unlimited by the condition of making compensation, it must then be conceded that the *necessity* of the state is the only foundation or justification for its exercise. Grotius, b. 1, ch. 1, sec. 6; b. 2, ch. 14, sec. 7; b. 3, ch. 19, sec. 7; ch. 20, sec. 7; Puff., b. 8, ch. 5, sec. 7; Cooley's Con. Lim., 524; McKIN-

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LEY, J., in *Pollard's Lessee v. Hagan*, 3 How., 223. It follows that one sovereignty cannot take for the use of another, because the taking in such case is not necessary to the sovereignty exercising the power. An attempt by a state to exercise this prerogative where it is not needful to the due execution of its own sovereign powers, is wholly unauthorized and inadmissible; as much so as it would be for the United States to exercise the like authority and employ the like agency for a foreign country. Puff. per Berbeyrac, b. 8, ch. 5, sec. 7, cited in 2 Kent's Com., 339; 6 How., 545; Cooley's Con. Lim., 524; *Kohl v. United States*, 91 U. S., 367; *Darlington v. Same*, 82 Pa. St., 387. For the reasons above stated, the law of this state (ch. 291 of 1874, sec. 2), which attempts to confer upon the state authority to condemn private property for the use of the United States, is unconstitutional and void. And in so far as a like intent is manifested in the act of congress, ch. 166, approved March 3, 1875, that also must be held unconstitutional. Neither the United States nor the state, nor both together, could submit this question by consent, by statute or in any other way, to a state court, because there is an absolute and fatal want of jurisdiction over the subject matter of the action. *Lincoln v. Tower*, 2 McLean, 474; 4 Wheat., 193; *Barron v. Mayor*, 7 Peters, 243; Const. of U. S., art. III, secs. 1 and 2. But there is no attempt in the act of congress to confer this authority on the state tribunals. It simply declares that compensation shall be ascertained "in the mode" provided by the laws of the state. While the laws of the state are thus made the "mode," its courts are not made the *forum*. It is contended, however, that there has been, in the case at bar, no exercise of the judicial power of the state, but that in fact the state court is constituted a federal tribunal for this particular purpose; and *Kohl v. United States*, *supra*, is cited as authorizing this proceeding. True, in that case it is said that congress may submit this question of compensation to commissioners or to any tribunal. But if to commis-

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sioners, would not the federal court be the supervising tribunal? So the tribunal referred to by the court seems to be a federal tribunal, at least one over which the federal courts have control. Moreover, in all the proceedings in this case there has been an attempted exercise of the judicial power of the state in enforcing the right of eminent domain. The proceedings in the circuit court are founded upon and regulated by the law of the state; and the right of eminent domain of the state is attempted to be exercised by the court in the same manner and to the same extent as in case of a railroad company taking private property for its use. To complete the parallel, the supreme court of the state is called upon to review the judgment of the circuit court. It cannot be successfully contended that these high courts are but instruments, like commissioners, who are subject to the legislative and judicial control of the general government. It is also claimed that sec. 2, art. III of the U. S. constitution, does not prohibit jurisdiction to the state courts in cases where the United States is a party. This view may be seriously questioned. *Martin v. Hunter's Lessee*, 1 Wheat., 304; *Campbell v. Sherman*, 35 Wis., 103. But if the position is correct, it does not follow that the state courts have jurisdiction as to either person or subject matter in all cases. Many cases might be suggested where jurisdiction does not exist and could not be conferred; and, for reasons already stated, the case at bar would seem to be one of them. But it is further claimed that the use of the United States is the public use of the state. If this be so, then it is equally the public use of every other state; and there is nothing to prevent the state of Illinois, as well as Wisconsin, from condemning lands within this state, in aid of this improvement. The cases of *Gilmer v. Lime Point*, 18 Cal., 229, and *Burt v. Merchants' Ins. Co.*, 106 Mass., 356, in which this doctrine is understood to be advanced, are opposed by the later and better considered cases of *Trombley v. Humphrey*, *Kohl v. United States*, and *Darlington v. Same*, *supra*.

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It is said that this proceeding is not an exercise of the right of eminent domain, but is for compensation, where all the essential elements of eminent domain have been actually exercised and accomplished. But until just compensation is made, there can be no lawful taking. U. S. Const., art. V; Const. of Wis., art. I, sec. 13. The owner might recover, in trespass, his damages accruing before suit, but not permanent damages as for the taking of the land. *Sherman v. M., L. S. & W. R. R. Co.*, 40 Wis., 645-652, and cases cited. The compensation provided and intended by the act of congress under which this proceeding was brought, is the "just compensation" referred to in the constitution. The state law regulating the mode of procedure, and which has been strictly followed by respondents (ch. 119 of 1872, the railroad act), is placed, in the present revised statutes, under the head of "Acquiring lands by right of eminent domain." By the terms of that act, the land-owner puts the law in force for the railroad company, when the latter neglects to act. And this court has repeatedly held that without such a provision in favor of the owner, the act would be void. *Shepardson v. M. & B. R. R. Co.*, 6 Wis., 612-13. The United States could have availed itself of this proceeding; and in that case would it still insist that the same was not an exercise of the right of eminent domain? Yet both cases are provided for in the law, in the same sentence; in both, the proceedings follow strictly the same course, and in each the title and right of possession of the land are vested in the United States.

2. Even by the most favorable interpretation of the act, for respondent, the government reserves to itself the right to be the judge of its own needs; and the petition in this case should allege, and complainant's proofs should show, in the language of the act, that "in the opinion of the officer in charge" it was not prudent that the dam be lowered. This provision is in the nature of a condition precedent to respondent's right of action. It must affirmatively appear that the

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land is required, or there is no jurisdiction to appoint commissioners. *Nichols v. Bridgeport*, 23 Conn., 189; *Judson v. Bridgeport*, 25 id., 428; *People v. Brighton*, 20 Mich., 57; *Bohlman v. Railway Co.*, 40 Wis., 157. The case of taking lands for a highway is parallel, in which the necessity must first be made to appear by a written application. The force and vitality of the act of congress, which is the foundation of this action, depend upon the opinion of the officer in charge. It is said that the *opinion* ought not to govern, because the dams have not been lowered. But, first, the law makes the *opinion*, and not the *lowering*, a test of the liability of the government. Secondly, the evidence shows that the government has no use for the dam, and has not used or repaired it, and that in fact the improvements contemplated will do away with its necessity. Thirdly, the plaintiffs are not without remedy, as the dam may be abated as a nuisance.

3. The defendant was in any event only liable for the damages caused by the Menasha dam, and not for those occasioned by the dam at Neenah. It is no argument against this position, that it would be difficult or even impossible to ascertain the damages done by each. *Lull v. Fox & Wis. Imp. Co.*, 19 Wis., 100. But it is settled in such cases that the law will infer equal damage. 20 Barb., 479; 20 Pick., 479; 11 Barb., 370; *Russell v. Tomlinson*, 2 Conn., 206; *Adams v. Hall*, 2 Vt., 9.

4. If damages are to be paid, it should be only such damages as are prescribed by the statute, *i. e.*, the value of the land taken, and damages to the land adjoining, by reason of the overflow, at the time of the taking, together with interest. The depreciated value of the use of the land by reason of the flowage, for six or any number of years, is not a proper item of damage. *Vilas v. Railway Co.*, 17 Wis., 502; *Pick v. Rubicon Hydraulic Co.*, 27 id., 443; Mills on Eminent Domain, § 218; 17 Minn., 444; id., 163; 3 Oregon, 311; 14 Wis., 617; 40 id., 167; 6 id., 636; 43 id., 190.

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For the respondents, there was a brief by *Gilson & Ware*, and oral argument by *Mr. Gilson* and *Geo. E. Sutherland*:

1. The government of the United States is not liable to be sued except by its own consent, given by law, so that, until the act of 1875, the plaintiffs, though deprived of their land, were wholly without redress to recover compensation. 4 How., 286; 9 id., 386. But congress has unquestioned power to refer any controversy between the government and its citizens to any officer, board of arbitrators, commission or court, in such way as to render the award or decision binding. *Brown v. United States*, 6 Court of Claims Rep., 171. In this respect, the position of the United States does not differ from that of a state. Each state is a public corporation, and as such subject to the power in its governing body to submit it as a party to the jurisdiction of any court. Dillon on M. C., § 14; *Kane v. Fond du Lac*, 40 Wis., 495; *Calkins v. State*, 21 id., 501; *Beers v. State of Arkansas*, 20 How., 527; *Murray's Lessee v. Hoboken Land & Imp. Co.*, 18 How., 272. By the act of March 3, 1875, congress, on behalf of the United States, consented that compensation might be ascertained in the mode provided by the laws of this state, having in view ch. 119 of 1872 and sec. 2, ch. 291 of 1874, which defined the only mode or procedure then in force for determining such compensation; and thereby submitted the United States as a party to the statutory proceeding, and permitted the government to be called into court and made a defendant like an individual or a private corporation. This was a waiver by the United States of its exemption as a sovereign from suits. To hold otherwise would be to render the statute a nullity, which is not to be permitted. Sedgw. Stat. and Con. Law, 233; *State v. Eau Claire*, 40 Wis., 533; Cooley's Con. Lim., 182-7. But if any doubt can arise from the language of the act, as to its intent and the remedy to be pursued, the practical construction given to it by the attorney general of the United States, acted upon by all persons affected by the improvement, and

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adopted and followed by the legal profession, is decisive of the question. Sedgw., 227; *Harrington v. Smith*, 28 Wis., 43. The statutes of the state and the act of congress are to be taken together. Sedgw., 229-233; *Duke v. Cahawba Nav. Co.*, 10 Ala., 82; *Reddall v. Bryan*, 14 Md., 444; 7 Opin. Att'y's Gen., 114. Finally, the payment of the commissioners in this and other similar cases is a legislative interpretation of the act of 1875, an acknowledgment of the correctness of the proceedings, and a ratification of the acts of the commissioners. 2. This act is not in conflict with secs. 1 and 2, art. III of the U. S. constitution. It is only cases arising under the laws, treaties and constitution of the United States, and admiralty and maritime cases, jurisdiction of which is prohibited to the state courts. In all other cases, the jurisdiction of the federal courts can only be made exclusive at the election of congress. *Sturgis v. Crowninshield*, 4 Wheat., 193; *Houston v. Moore*, 5 id., 1; *Delafield v. Illinois*, 2 Hill, 159. And in these cases it is not because the United States is a party that the state courts are prohibited to act; but jurisdiction of the subject matter is forbidden. The constitution no more makes the federal judiciary exclusive as to all suits in which the United States is a party, than it does of all suits to which citizens of different states are parties. The only superiority of the government—and that not derived from the constitution—is its exemption, by virtue of its sovereignty, from suits without its consent. Want of consent excludes the jurisdiction of all courts. When consent is given, the government is subject to the same rules as an individual, in relation to jurisdiction of the person and mode of procedure. The act of 1875 did not establish the court nor confer jurisdiction; but congress merely consented to the United States being brought in as a defendant. 3. That the flooding of land is a taking thereof, within the meaning of the constitutional provision requiring compensation, is abundantly established. *Arimond v. G. B. & Miss. Canal Co.*, 31 Wis., 316; 35 id., 41; *Pum-*

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pelly v. Green Bay Co., 13 Wall., 166; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich., 308; *Orr v. Quimby*, 54 N. H., 590; *Hooker v. New Haven Co.*, 14 Conn., 146; Mills' Em. Dom., § 30. This action is not a proceeding for the exercise of the right of eminent domain, but for compensation, where all the essential elements of eminent domain have been actually exercised and accomplished so far as the defendant is concerned. This right is given for the purpose of obtaining control and possession of property for public use. In this case that has already been secured, and the only right remaining to respondents is the legal title, to be vested in the government, or its possession made lawful, by making compensation in damages. Sedg. Stat. and Con. Law, 455-6; Cooley's Con. Lim., 524. The actual occupation of the land and exclusion of the owners therefrom precludes all inquiry into the necessity of the taking, unless the owner chooses to raise it. *Higgins v. Chicago*, 18 Ill., 276; *Chicago v. Wheeler*, 25 id., 478. 4. The question whether, in the opinion of the officer in charge, it is not prudent that the dam be lowered, cannot be inquired into on appeal from the award of the commissioners. It should have been raised before the court or judge upon the application for appointment of commissioners, and reviewed by *certiorari* or some other direct proceeding to the same end. The commissioners are not a body to hear grave questions of law. They are presumably selected from their familiarity with property, and the only issue before them is the amount of damages or compensation. Upon appeal, no other or different issue can be raised than the one before the commissioners. *Miller v. P. & McG. R'y Co.*, 34 Wis., 533; *Stringham v. Oshkosh & Miss. R. R. Co.*, 33 id., 471; *Burns v. M. & M. R. R. Co.*, 9 id., 450; *Ney v. Swinney*, 36 Ind., 454; *M. & M. R. R. Co. v. Rosseau*, 8 Iowa, 373; *Matter of N. Y. C. R. R. Co.*, 66 N. Y., 407; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. St., 100; *Delaware, etc., R. R. Co. v. Burson*, 61 id., 369; *United States v. Reed*, 56 Mo., 565. 5. But, even were that

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question subject to review, it was not error to refuse defendant's instruction on that subject. The dam has not been lowered. No steps have been taken and no directions given to lower it, nor any intention manifested by the government or any of its authorized agents that it is to be lowered. On the contrary, appropriations have been made yearly by congress for the "repair, preservation and completion" of the works of the improvement. It would be a remarkable construction of this statute, to hold that, while the United States continues to maintain the dam at the same height and flow the lands to the same extent as heretofore, yet, as the officer in charge is of opinion that it is prudent that the dam be lowered, no compensation shall be ascertained or allowed. 6. It is no defense to this action that the Neenah dam may have contributed to produce the injury. Both dams hold back the same body of water, and the owners of each are responsible for the whole damages as co-trespassers. 1 Addison on Torts, 332, 734-5; *Hume v. Oldacre*, 1 Starkie, 352; *Clark v. Newsam*, 1 Exch., 140; *Holmes v. Wilson*, 10 Ad. & El., 503; *Bowyer v. Cook*, 4 C. B., 236; *Scheike v. Johnson*, 39 Wis., 384; 41 id., 602; 35 id., 41; 31 id., 316; 13 Wall., 166. 7. The dam having been maintained at the same height, and the land of plaintiffs flowed to the same extent, since the transfer to the government as before, the United States must be held to have adopted the original taking, and is legally liable to make compensation for all damages caused by such taking, not barred by the statute of limitations. Opin. of Att'y Gen. Pierrepont; *Pfeifer v. Railroad Co.*, 18 Wis., 155; *Gilman v. Railroad Co.*, 37 id., 317; 40 id., 653. The plaintiffs should be made whole for the injury done them, and the correct rule as to the measure of damages was given to the jury. *Cooley's Con. Lim.*, 568, 570, 571; *Darge v. Horicon Iron Co.*, 22 Wis., 659; *Sherman v. R. R. Co.*, 40 id., 645; *Folsom v. Log-Driving Co.*, 41 id., 602; *McDonald v. G. B. & Miss. Canal Co.*, 42 id., 335; *Simmons v. Brown*, 5 R. I., 299; *Van Riper v.*

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Essex Public Board, 9 Vroom, 23; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich., 308. 8. While the proceeding is for ascertainment of compensation only, there is no valid objection to the United States acquiring title to property for public uses by proceedings in the state courts in the mode provided by the state laws. Such proceedings have been upheld in numerous cases where lands have been condemned through the state courts for purposes of forts, lighthouses and public buildings. And, in the absence of any other remedy, the statute should be liberally construed to advance and effect the intention of the legislative body, and not adjudged invalid unless clearly and unmistakably in conflict with the constitution. 7 Opin. Att'y's Gen., 114; *Reddall v. Bryan*, 14 Md., 444; *Harris v. Elliott*, 10 Pet., 25; *United States v. Reed*, 56 Mo., 565; *Gilmer v. Lime Point*, 18 Cal., 229; *Burt v. Merchants' Ins. Co.*, 106 Mass., 356; *Orr v. Quimby*, 54 N. H., 590.

Sloan, Stevens & Morris also filed a brief on the same side, in behalf of the *Green Bay & Mississippi Canal Co.*:

1. The state court has jurisdiction. The judiciary act of 1789 (1 U. S. Stats. at Large, 78), recognizes the concurrent jurisdiction of the state courts in cases where the United States is a plaintiff. It is claimed that this does not apply because here the United States is a defendant. But jurisdiction of the United States as a party defendant is obtained by consent. Where the act giving consent omits to designate the forum, that one will be presumed to have been intended which is provided for like actions in which the United States is plaintiff. But in this case the act does designate the state court as the forum. To put an end to all doubt as to the intention of congress with reference to the forum, chap. 359 of 1877-8, p. 222, providing for payment of the commissioners in this case, recites that they were appointed "pursuant to an act of congress of March 3, 1875." It was certainly competent for congress to designate the state court. *Kohl v. United States*,

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91 U. S., 367; Mills on Em. Dom., §§ 347-9; *United States v. Dumplin Island*, 1 Barb., 24; *United States v. Fox*, 94 U. S., 315; *Warren v. Wisconsin Valley R. R. Co.*, 6 Biss., 425. If this act does not authorize proceedings *against* the United States, it performs no useful purpose whatever, as the judiciary act authorizes suits in a state court where the United States is plaintiff; and the act declares, and the courts also hold, condemnation proceedings to be a suit. Sec. 14, ch. 119, Laws of 1872; *United States v. Block 121*, 3 Biss., 208. It provides specially for proceedings, according to the mode of the state law, in cases of flowage *theretofore* occasioned, thus clearly recognizing the right of the owner to take the initiative. Ch. 119, Laws of 1872, secs. 14, 22; ch. 291, Laws of 1873, secs. 2, 4; *Sherman v. Railroad Co.*, 40 Wis., 645; *Driver v. W. U. R. R. Co.*, 32 id., 569; *Bohlman v. Railway Co.*, 30 id., 105; 40 id., 157; *Darlington v. United States*, 82 Pa. St., 382. 2. Sec. 2, ch. 291, Laws of 1874, is constitutional. It was not the intent of this act to provide that the state should vicariously exercise its right of eminent domain in behalf of the United States, although the weight of authority is in support of that right. *Gilmer v. Lime Point*, 18 Cal., 229; *Burt v. Merchants' Ins. Co.*, 106 Mass., 356; 1 Barb., 24; *United States v. Reed*, 56 Mo., 565; *Reddall v. Bryan*, 14 Md., 441. Other than to prescribe conditions affecting the mode of exercising the right of eminent domain, its sole province, in connection with other acts and numerous memorials, is to give consent to the jurisdiction of the United States over the property to be acquired, *i. e.*, to perform the work of ex-appropriation or cession; and similar acts have been sustained in other states, notably in Ohio, New York, Missouri, Illinois and Maryland, as will be seen by cases above cited. See also U. S. Const., art. I, sec. 8, cl. 17 — Revision of 1878, p. 21, and cases there cited; 1 U. S. Stats. at Large, 426, §§ 1 and 2; 10 Opin. Att'ys Gen., 34. But it is unimportant whether as a state law this act is constitutional or not; for by the act of congress of

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March 3, 1875, it was incorporated therein, and so became a law of the United States. *Wood v. Hustis*, 17 Wis., 416; *Crosby v. Smith*, 19 id., 449. 3. This appeal involves only an inquiry into the amount of compensation; and the question whether or not, in the opinion of the officer in charge, it is prudent to lower the dam, cannot be raised. The only mode in which that question can be reviewed, is by *certiorari*, or bill in equity. R. S. Wis., secs. 1846-7; *Miller v. Railway Co.*, 34 Wis., 533; *Stringham v. Railroad Co.*, 33 id., 471; *Diedrich v. Railroad Co.*, 42 id., 248; *Burns v. Railroad Co.*, 9 id., 450; *Railroad Co. v. Davis*, 43 N. Y., 137; *In re Railroad Co.*, 66 N. Y., 407. This would be true even where the United States was the moving party. It is obvious that where compensation is sought for lands already taken by consent or acquiescence of the land-owner, the right of the government to proceed is waived. Again, the neglect, for so long a period, to lower the dam should estop the government upon this question. 4. The damages under the rule adopted by the court below are less than plaintiffs are entitled to. Observe, that nothing whatever is given for the permanent injury to the lands not taken, but only the depreciation in rental value for six years, a mere fraction of such permanent injury. *Reed v. R. R. Co.*, 105 Mass., 303; *B. & P. R. R. Co. v. McComb*, 60 Me., 290; *Del. & C. R. R. Co. v. Burson*, 61 Pa. St., 369; *Whitman v. Railroad*, 7 Allen, 313; *Parks v. Boston*, 15 Pick., 198; *S. F. & S. J. R. R. Co. v. Mahoney*, 29 Cal., 112; 21 Ohio, 334; Mills on Em. Dom., secs. 65-76, 148, 174-6, 216, 218; Pierce on Am. R'y Law, 230, note (1); *Forster v. Railroad Co.*, 23 Pa. St., 371. 5. "Compensation," as used in the railroad act and the act of congress of 1875, applied to the facts of this case, necessarily covers all damage from flowage, past, present and future, whether arising when the state, the companies or the United States were in possession of the works of improvement. The ground of liability is, that the government has adopted and ratified the original taking, and is

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therefore bound to make compensation. Mills on Em. Dom., sec. 216; *Pomeroy v. Railroad Co.*, 25 Wis., 641; *Pfeifer v. Railroad Co.*, 18 id., 155; *Gilman v. Railroad Co.*, 37 id., 317, and 40 id., 653; Green's Brice's Ultra Vires, b. IV, 546, citing *Prouty v. Railroad Co.*, 52 N. Y., 363, and many other cases. Not only is this sound law, but it is for the interest of the government to have the question so determined, as thereby the great majority of cases against it will be barred by limitation, the flowage having been maintained now for more than twenty years.

George E. Sutherland, representing the interests of other parties having similar claims against the United States, also filed a brief in this case, as *amicus curiæ*. Upon the question of jurisdiction, he argued that under the articles of confederation the United States might submit itself to the jurisdiction of the state courts (*Beers v. State of Arkansas*, 20 How., 527; *Cohens v. Virginia*, 6 Wheat., 264; *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How., 283); that since the adoption of the constitution, many acts of congress had been passed conferring such jurisdiction, under which there had been repeated decisions of the courts; and that it was hardly possible that congress in all these acts, and the courts in acting under them, had been proceeding all these years upon a radically wrong hypothesis. Acts of congress of Sept. 24, 1789, ch. 20, sec. 11; June 5, 1794, ch. 49, sec. 9; June 9, 1794, ch. 65, sec. 12; July 6, 1797, ch. 11, sec. 20; March 8, 1806, ch. 14; April 21, 1806, ch. 49, sec. 14; Feb. 24, 1807, ch. 20; April 21, 1808, ch. 51; Aug. 2, 1813, chaps. 38, 39; March 3, 1815, ch. 101; April 10, 1816, ch. 44, secs. 17, 18; March 3, 1845, ch. 43, sec. 17; U. S. Statutes at Large, 1874, secs. 2010, 3833, 5328. Again, if under the articles of confederation the state courts could take jurisdiction of the United States, the constitution must in express terms take away the power, or it would not be held to be abrogated. *Delafield v. Illinois*, 2 Hill, 164. But the proper construc-

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tion of art. III of the U. S. constitution has been ably discussed in many courts, and if the *dictum* in *Martin v. Hunter's Lessee*, 1 Wheat., 305, would seem to sustain the position of appellant's counsel, it has been repeatedly overruled. *Teall v. Felton*, 1 Coms., 543, affirmed in 12 How., U. S., 292; *Delafield v. Illinois*, *supra*; *United States v. Lathrop*, 17 Johns., 4; *Clafin v. Houseman*, 93 U. S., 130; *In re Stacy*, 10 Johns., 328; *United States v. Dodge*, 14 id., 95; *Commonwealth v. Fuller*, 8 Met., 313; *Postmaster General v. Early*, 12 Wheat., 139; Opinion of WASHINGTON, J., in *Houston v. Moore*, 5 Wheat., 1; Story on Const., 533; 1 Kent's Com., 396 et seq.; No. 82 of Federalist; *Cotton v. United States*, 11 How., 229. Further, the practice of the United States in condemning lands for lock sites and other purposes all along the river improvements from Portage to Oshkosh, following exactly the course adopted in this case, is a strong argument that the United States regarded the act as valid. As to the defense that the Neenah dam was partly responsible for the injury to the land, the true rule is to be found in *State ex rel. Reynolds v. Babcock*, 42 Wis., 150, and *Folsom v. Log-Driving Co.*, 41 id., 602, viz., that a tort is always several, and it is no defense that some other wrongdoer has contributed to the injury. Upon the question of damages, he cited *Bevier v. Dillingham*, 18 Wis., 529.

ORTON, J. The state of Wisconsin, in making the improvement of the Fox and Wisconsin rivers, under the act of congress of August 8, 1846, making a grant of lands for such purpose, and the act of the legislature of Wisconsin of June 29, 1848, accepting the trust, constructed, as a part of such improvement, the dam by means of which the lands of the plaintiffs were overflowed and damaged. Any question which might otherwise have arisen, whether such flowing of and consequential damages to the lands of the plaintiffs by means of such dam constitute a *taking* of such lands for public use

under the right of eminent domain, subject to the constitutional condition of making just compensation therefor, has been removed by the decision of the supreme court of the United States in the case of *Pumpelly v. Green Bay Co.*, 13 Wall., 166, in which these lands, and the rights of the former owner as to compensation for such flowage, were considered, and it was held that such flowage was such a *taking*. The act of congress of March 3, 1875, was doubtless framed in view of this decision, and in terms provided for the ascertainment of "compensation *now* legally owing" for lands "*now* flowed" by means of a part of the works "*heretofore* constructed."

Until this act of congress, after the United States had become the owner of the improvement and assumed the burden of making such just compensation not only for lands thereafter to be taken, but also for lands which had been already taken by such flowage, there had been no provisions made by law for such compensation or for ascertaining the same. As the dam was completed so as to cause the flowage and consequential damage in the year 1861, this act may well be construed to authorize the ascertainment of the *past* damages of the plaintiffs, as well as the future or permanent damages to the lands, and in this respect may not be strictly analogous to a *future* taking or condemnation of lands for the use of the improvement. It will be seen that the act provides for both cases, and as to the questions of constitutionality and jurisdiction these provisions may well stand together; but as to the measure of damages in each case, the provisions are distinctive and independent.

Such a provision, allowing full compensation to the owner of lands already flowed and damaged by works already constructed, as for lands actually taken at the time when the flowage was caused by the works, for *past* damages, within the period of limitation by the statute of the state, as well as for future and permanent damages, would be most reasonable, and

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appears to be within the terms of the act, and comports with the liberal and equitable policy of the United States in taking charge of the improvement and assuming the liability of making full and just compensation to the private owner for lands taken for its use.

The first section of the act provides, "that whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox rivers in the state of Wisconsin, it becomes necessary or proper, in the judgment of the secretary of war, to take possession of any lands, or the right of way over any lands, for canals and cut-offs, or to use any earth, quarries or other materials lying adjacent to or near to the line of said improvement, and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after first having paid or secured to be paid the value thereof, which may have been ascertained in the *mode* provided by the laws of the state wherein such property lies. In case any lands or other property is *now* or shall be flowed or injured by means of any part of the works of said improvement *heretofore* or hereafter constructed, for which compensation is *now* or shall become legally owing, and, in the opinion of the officer in charge, it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained *in like manner*. The department of justice shall represent the interests of the United States in legal proceedings under this act, and for flowage damages hereinbefore occasioned."

The second section appropriates \$25,000, to be applied in payment for the property and rights so taken and used.

In section 2 of an act of the legislature of this state approved March 12, 1874, it is provided that, "in case the lands of any person *have been* overflowed, or injured, or taken, or if it shall be found necessary or proper hereafter to overflow, injure or take the lands of any person, for or by reason of the construction of any dam, bridge, lock or pier, or the re-

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pair or the enlargement thereof, or the construction, repair or enlargement of any canal or other works, by the United States government, in the improvement of any harbor, river or stream of water in this state, the compensation for damages sustained by the owner or owners of the lands overflowed, injured or taken as aforesaid, may be ascertained, determined and paid, in the same manner as prescribed in chapter 119 of the laws of 1872, entitled, 'An act in relation to railroads and the organization of railroad companies,' approved March 22, 1872, for acquiring title to lands by railroad companies; and all the provisions of said act may apply in case of the overflowing, injury or taking of lands by the United States government for the purposes aforesaid, which are properly applicable thereto."

I have emphasized the words in the above acts used in a past tense, significantly applicable to these proceedings, which were instituted and have been conducted in accordance with said acts as far as their provisions were applicable.

It is contended by the learned counsel of the appellant, that the language, "in the mode" and "in like manner," as used in the act of congress, refers only to the method, form or manner of the proceedings themselves, and does not embrace the tribunal in which they are to be instituted, and does not import any direction or permission that such proceedings may be taken in the courts of the state in which the lands overflowed are situated. We think such is not its meaning, because — *First*. Such a strict construction would destroy the only purpose of the act, and make the act itself wholly unnecessary; for without it there is no doubt of the jurisdiction of the federal courts in such a case, or of their method of proceeding. *Kohl et al. v. United States*, 91 U. S. Rep., 367. *Second*. In that case Mr. Justice MILLER, in his opinion, uses the word "mode" as embracing both the proceedings to condemn lands and the tribunal in which they are to be taken, when he says: "Doubtless congress might

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have provided a *mode* of taking the land and determining the compensation to be made, which would have been exclusive of all other *modes*. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The *mode* might have been by a commission, or it might have been referred exclusively to the circuit court; but this, we think, was not necessary." *Third*. Congress adopted and ratified such a construction of this language as gives direction or permission for these proceedings to be instituted in the courts of this state, by the subsequent act of June 20, 1878, making an appropriation "for payment of George F. Wheeler, Robert H. Hotchkiss and Aaron Walters for services rendered by them as commissioners, appointed pursuant to an act of congress of March 3, 1875, to appraise damages to lands in Fond du Lac county, Wisconsin, caused by the improvement of the Fox and Wisconsin rivers."

We assume, therefore, that by the above acts of congress and of the legislature of this state, the United States government has authorized and directed the institution of these proceedings in the state court, and fully assented thereto, and this state has consented to the use of the state tribunals for such purpose. This brings us to the question of the constitutionality of the laws above cited, which is made the important question in this case by the learned counsel of the appellant. The condemnation of private property to the public use by the United States is the exercise of the sovereign power, through such agencies as congress may determine; and, as the supreme court has said in *Kohl et al. v. U. S.*, *supra*, "doubtless congress might have provided a mode of taking the land and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what *tribunal*, or by what agents, the taking and the ascertainment of the just compensation should be accomplished. It might have been by a commission, or it might

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have been referred exclusively to the circuit court." But, after all, the condemnation is made by the government through such instrumentalities and agencies as congress may have provided by law as the means by which, and the mode in which, the sovereign power to such end might be exercised. It is scarcely a delegation of the power of condemnation to designate the courts in which, or the agencies by which, it is exercised, although it is held that the power even may be delegated. *Pratt et al. v. Brown*, 3 Wis., 603. But more properly "the statutory process for its exercise" may be delegated. *Bohlman v. Green Bay & Minn. Railway Co.*, 40 Wis., 168.

The power of eminent domain is conceded by the learned counsel to be political and not judicial, and many authorities are cited by him in support of the principle, such as *People v. Smith*, 21 N. Y., 597; *Hays v. Risher*, 32 Pa. St., 169; *Bankhead v. Brown*, 25 Iowa, 540, and others; and if *political*, of course it cannot be delegated to the courts, although congress may by law confer upon any court or tribunal, or upon a commission, jurisdiction, and prescribe and determine the proceedings for the efficient and convenient exercise of this power by the government. In this case, the power to condemn and take the lands of the respondents for the use of the improvement had already been exercised, and they have long since been actually appropriated to such use, but *conditionally*, upon the payment of just compensation therefor, when ascertained in the way and mode prescribed by the law of congress above considered; and neither this state nor its courts have assumed any power to condemn, but only to determine the compensation to be made for lands already taken and condemned, according to the act of congress and the statute of this state.

Whether the United States had taken the first step and asked the appointment of these commissioners, as would have been necessary to assert the power of eminent domain and condemn lands not before taken and already appropriated, or the respondents had become the moving party, and asked for

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the appointment of commissioners to ascertain the amount of the just compensation and assess the damages for lands already taken and appropriated, as in this case, not only the proceedings but the legal results would have been the same. The commissioners, in either case, take cognizance only of the question of compensation and damages as for lands taken and condemned. In the first case, the proceeding would be a suit at law, brought by the United States, in form, against the owner of the lands sought to be condemned. *Kohl et al. v. U. S., supra*. May not such a suit be brought by the United States in a state court? Why not? The United States, like any other party, may bring suit for any proper purpose in a state court. *In Cotton v. U. S.*, 11 How., 229, the suit was brought in the superior court of West Florida for damages for trespass upon government lands, by the United States, and Mr. Justice GRIER says of the question of jurisdiction: "Every sovereign state is of necessity a body politic or artificial person, and as such capable of making contracts and holding property, both real and personal. . . . It would present a strange anomaly indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. . . . Although as a sovereign the United States may not be sued, yet as a corporation or body politic they bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws. . . . As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in *Dugan v. United States*, 3 Wheat., 181, 'it would be strange to deny the right which is secured to every citizen of the United States.'" See, also, *The United States v. The Bank of the Metropolis*, 15 Peters, 392, and *The United States v. Gear*, 3 How., 120. This proceeding, when instituted by the United States, is a suit at law, and as Mr. Justice STRONG says in *Kohl v.*

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U. S. et al., supra, "it is an attempt to enforce a legal right."

There can be no question but that the United States may institute these proceedings in a state court without any special legislative permission, and secure precisely the same legal results as were effected in this case. When the proceeding is instituted by the private owner of the property already taken for public use, as in this case, merely for the ascertainment of the compensation to be paid therefor, it may be in form a suit against the United States, and be so entitled; but this *form* of the proceeding does not change its substance, and it remains, until the ascertainment of the compensation, a judicial proceeding by the United States to enforce the right of eminent domain by the condemnation of the property to public use. But if it be a suit, both in form and substance, against the United States, then there is no principle better established than that the United States may, by act of congress, waive its sovereignty, and authorize, permit or consent that such suit may be brought in the state court.

Without such consent, it is an axiom that no sovereignty, state or national, can be sued in any court—in its own or foreign courts. In *United States v. Clarke*, 8 Peters, 444, Chief Justice MARSHALL says: "As the United States are not suable of common right, the party who institutes such suit *must bring his case within the authority of some act of congress* or the court cannot exercise jurisdiction over it." In that case the suit was by petition against the United States, praying that the court would decree confirmation of the title of the petitioner to certain lands claimed to have been granted to him by the governor of the province of Florida; and the court held that jurisdiction of the superior court of Florida, in such case, had been conferred by the consent of the United States by act of congress. In *Reeside v. Walker*, 11 How., U. S., 290, Mr. Justice WOODBURY says: "It is well settled, too, that no action of any kind can be sustained against the

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government itself, for any supposed debt, *unless by its consent under some special statute allowing it*, which is not pretended to exist." In the late case of *Carr v. The United States*, 98 U. S., 437, Mr. Justice BRADLEY says: "We consider it to be a fundamental principle, that the government cannot be sued, *except by its own consent*." See, also, 1 Kent's Com., 297; 2 Story, Const., § 1699.

It is significant that numerous statutes of the United States, from 1789 until the present, have been passed authorizing suits to be brought against the United States in the state courts and for various purposes, and such authority has not been questioned. It is needless to discuss questions not in this case, and to review authorities cited by the learned counsel, where the United States were a party to litigation in state courts and no such jurisdiction was conferred by act of congress expressing consent.

We have been cited to no case, and we think none can be found, in which it has been held that such jurisdiction may not be conferred by such legislative assent, or that such an act of congress was unconstitutional.

We shall be brief in disposing of the other questions raised upon this appeal.

First. The title of the plaintiff appears to have been sufficiently proved.

Second. The condition found in the act of congress above referred to, "and in the *opinion* of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner," imposes upon the officer of the United States an *active*, not a passive duty, which is not performed by the mere *expression* of an opinion, but which requires such final and conclusive action of the government of the United States, by such officer, as would be a legal release and relinquishment of all present and future right to maintain the dam. Any other construction would allow the mere opinion of the officer on the ques-

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tion of prudence, which might or might not result in a relinquishment of the right to maintain the dam for the use of the improvement, to be a perpetual obstruction to the plaintiff's right to the damages or compensation that he might thereafter suffer, and be otherwise clearly entitled to have ascertained. We think the intention of this condition clearly was that, in the proceedings to ascertain the damages by flowage caused by such dam, if it should appear that the United States had relinquished its right to longer maintain the dam, then *future* and *permanent* damages should not be assessed, but that such relinquishment would not in any way affect the plaintiff's right to damages *already* suffered. The evidence not only showed that no such relinquishment had been made, but that it probably would not be made in the future; and therefore such mere opinion constituted no defense to the plaintiff's claim for permanent damages. The construction of this condition, claimed by the learned counsel for the appellant, would most clearly make it repugnant to the constitutional right of the plaintiffs to obtain compensation, and to the act of congress providing for its enforcement, and it would be utterly void.

Third. The fact that another dam besides the one in question might, to some extent, contribute to produce the flowage, raises a question which has already been decided by this court, and by the supreme court of the United States, adversely to the position taken by the counsel for the appellant. *Arimond v. Green Bay Co.*, 35 Wis., 41, and *Pumpelly v. Green Bay Co.*, 13 Wall., 166.

Fourth. The rule of damages submitted by the court to the jury appears to be more favorable to the United States than the rule contended for by the learned counsel of the appellant, and seems to have been substantially in compliance with the construction of the act of congress which we have already given to it, as allowing the assessment of all the past damages which were caused by the construction of the dam

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within the period of statutory limitation. This liberal rule of construction of the act of congress was the one adopted by the Hon. Edwards Pierrepont, then attorney general of the United States, in his opinion under date of November 10, 1875, to General Gill, the special attorney of the government, after the commencement of these proceedings. He says: "On this point I think it may well be conceded that if, at the period of the transfer [the transfer of the improvement to the United States], there were any lands flowed by means of the works of said improvement, for which the land-owners were then legally entitled to claim compensation as for property taken or appropriated for public purposes, and the United States thenceforth maintained the flowage of the lands in the same manner and to the same extent, thus, as it were, adopting the original taking or appropriation thereof, the obligation to pay such compensation devolved upon the United States, not by virtue of any agreement or understanding with said company, but by *mere operation of law*." This rule of damages was substantially adopted, in all probability, by the commissioners making the assessment, as well as by the circuit court on appeal.

By the Court.—The judgment of the circuit court is affirmed, with costs.

TAYLOR, J., took no part in this cause.

 FICK vs. MULHOLLAND.

January 7—February 3, 1880.

REVERSAL OF JUDGMENT. (1) *For failure of jury to find upon some issues of fact.*

EVIDENCE: DISSOLUTION OF PARTNERSHIP. (2) *When declarations of one partner inadmissible.*

SPECIAL VERDICT. (3) *Power of court to send jury back to reconsider verdict.*

EXEMPTION. (4) *What constitutes a claim of property as exempt from execution.*

1. The fact that, in an action at law, only one of three issues of fact made by

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the pleadings was submitted to or passed upon by the jury, is held no ground for reversing a judgment for the plaintiff (in whose favor the third issue was found), where there was evidence on plaintiff's part to sustain the judgment, and *no conflicting evidence* that was admissible.

2. Where the question is, whether a partnership was dissolved before certain goods were seized on execution for a partnership debt, proof of statements made by one of the former partners, after such alleged dissolution, in the absence of the other partner, is inadmissible.
3. After the bringing in of a special verdict, the court may send the jury back to make an answer more specific.
4. Where plaintiff's goods, seized by an officer on attachment, were in fact exempt from seizure, and the jury found that after the seizure plaintiff demanded their return, and stated, as his reason for the demand, "that it was his property, and he wanted it to support his family:" *Held*, that this shows a claim of the property *as exempt*.

APPEAL from the Circuit Court for *Manitowoc* County.

Action to recover damages for the alleged unlawful taking and conversion by the defendant of thirty-seven barrels of beer of the value of \$167, and three hundred and thirty pounds of hops of the value of \$33. Answer, that the defendant, at the time of the alleged taking and conversion, was the sheriff of Manitowoc county; that the property in controversy was then the property of the plaintiff and one Maiboom, as partners; that a writ of attachment against plaintiff and Maiboom was duly issued by a justice of the peace, and placed in the hands of defendant for service; that he seized the property by virtue of such writ; and that he afterwards sold the same by virtue of an execution issued on a judgment duly recovered against the plaintiff and Maiboom in the action in which the writ of attachment issued.

On the trial, the plaintiff claimed that he was the sole owner of the property; that it was exempt from execution; that he demanded it of the defendant after seizure, as exempt property; and that it was of the value stated in the complaint. The defendant claimed that the property belonged to the plaintiff and Maiboom, as partners, and that the partnership interest therein was never severed so as to subject it to any exemption right; also, that the plaintiff did not claim it under the ex-

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emption law, but only demanded it generally, without stating the grounds of his demand.

The opinion contains a sufficient statement of the testimony, and the rulings of the court on objections thereto.

The court refused to give certain instructions, proposed on behalf of the defendant, submitting to the jury the questions whether the plaintiff and Maiboom were partners, and the owners of the property in controversy when the defendant seized it, and whether, although there may have been a dissolution before that time, such dissolution was not conditional and inoperative to divest Maiboom of his interest in the partnership assets.

The court submitted the following questions to the jury: "*First.* When *Fick* demanded the property of *Mulholland*, after he had levied upon it, did *Fick* state to him why he demanded and wanted the property?" The jury answered, "He did." "*Second.* If you answer that he did, state the reason he gave *Mulholland* for making the demand." The jury answered, "Because it was his property."

When the verdict was returned, the following proceedings were had: "By the Court: 'That will not do, gentlemen; that is not an answer to one of the questions. The question is, If you answer that he did, state the reason he gave *Mr. Mulholland* for making the demand. Do you mean to say, by that answer, that that was the only reason he gave?' By a juror: 'That is the only reason we could find.' The court: 'The answer is, Because it was his property. If you mean to say by that, Because it was his property, and for no other reason, then I think, perhaps, that you find that that was the only reason. You should make it a little more definite and certain, that is all, so that there can be no question about entering a verdict on it; and I think I shall send you out and let you make that answer more definite. If you mean to say it was because it was his property and that was the only reason, say that was the only reason.'

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"To the giving of which said charge the defendant excepted. Thereupon the jury retired, and afterwards returned the following addition to their previous answer to the second question, viz.: 'And he wanted it to support his family.'"

No general verdict was returned. The court denied a motion for a new trial, and gave judgment for the plaintiff for the value of the property stated in the complaint, and interest. The defendant appealed from the judgment.

For the appellant, there was a brief by *Nash & Schmitz*, and oral argument by *Mr. Nash*:

1. There is no exemption to a partnership as such; and to entitle the partner individually to exemption, there must first be a severance (*Russell v. Lennon*, 39 Wis., 570; *Pond v. Kimball*, 101 Mass., 105; *Gaylord v. Imhoff*, 26 Ohio St., 317; *Bonsall v. Comly*, 44 Pa. St., 442); and the severance must be by consent of all; one partner alone cannot sever. *Burns v. Harris*, 67 N. C., 140. If the plaintiff, on dissolution of the partnership, agreed to take the property of the firm and pay the partnership debts, he held as trustee until that end was accomplished, and the property remained that of the copartnership. *People ex rel. Till v. Roy*, 3 Neb., 261; *Giddings v. Palmer*, 107 Mass., 269; *Matter of Shepard*, 3 Ben., 347; *Parsons on Partn.*, 331, 393, 394. 2. The special verdict did not determine a single one of the issues raised by the pleadings, and the court erred in entering judgment thereon. *Eisemann v. Swan*, 6 Bosw., 668; *Du Bay v. Uline*, 6 Wis., 588; *Bates v. Wilbur*, 10 id., 416; *Child v. Child*, 13 id., 17; *Everit v. Walworth County Bank*, 13 id., 419; *Rose v. Tolley*, 15 id., 443; *Gorman v. Ball*, 18 id., 24; *Appleton v. Barrett*, 22 id., 568; *Warner v. Hunt*, 30 id., 200. 3. The court erred in rejecting testimony as to a conversation between the defendant and plaintiff's copartner upon the subject of the partnership. The declarations and admissions of a partner are competent evidence against the parties, to prove the partnership. 2 Greenl. Ev., § 484, and cases there cited. 4. The jury

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answered the second question submitted to them in a plain, direct manner, and it was error to send them out a second time, against defendant's objection, with a direction to find some further reason given by plaintiff for the demand; especially when one of the jurors informed the court that they had returned the only reason they were able to find. *Blesch v. C. & N. W. Railway Co.* [ante, p. 168.]

For the respondent, there was a brief by *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*. They contended that, whether the property in dispute was partnership property or not, the plaintiff could claim it as exempt. *Russell v. Lennon*, 39 Wis., 570; *Newton v. Howe*, 29 id., 531; *Stewart v. Brown*, 37 N. Y., 350; *Radcliff v. Wood*, 25 Barb., 52; *Hoyt v. Van Alstyne*, 15 id., 571; *Servanti v. Lusk*, 43 Cal., 238; *Howard v. Jones*, 50 Ala., 67; *Worman v. Giddey*, 30 Mich., 151; *Thompson on Homesteads, etc.*, §§ 210, 211, 216. They further argued that the question of *demand* was the only one in dispute; and as the uncontradicted evidence proved the other facts necessary to entitle plaintiff to recover, judgment was properly rendered upon the special verdict. Uncontroverted or immaterial facts are not submitted to a jury. *Wells on Questions of Law and Fact*, § 21; *Hutchinson v. C. & N. W. Railway Co.*, 41 Wis., 541, 546; *McNarra v. Same*, id., 75; *Williams v. Porter*, id., 422.

LYON, J. The pleadings presented the following questions of fact for determination: *First*. Was the property in controversy, when seized, the sole property of the plaintiff, or was it the property of the firm consisting of the plaintiff and Maiboom? *Second*. Did the plaintiff demand the property as being exempt from seizure and sale under the attachment and execution? *Third*. What was the value of the property? The second question alone was submitted to the jury. By the rule asserted in *Hutchinson v. Railway Co.*, 41 Wis., 541, and

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repeatedly applied since, the failure to submit the other questions of fact to the jury is not error unless the testimony bearing upon them is conflicting.

After careful examination of the testimony, we are unable to say that there is any conflict of proof. It satisfactorily appears that the plaintiff and Maiboom were partners in the brewing business before the property was seized, but that the copartnership was dissolved by mutual consent, and the property of the firm transferred to the plaintiff, a few days before the seizure, the plaintiff undertaking to pay the debts of the firm. One Blouquelle, a witness called by the defendant, testifies that he was present when the partners settled their matters, and gives the various items of account adjusted between them. His testimony is, that the price of the beer and hops in controversy was then agreed upon, and the amount charged to plaintiff in the settlement; that plaintiff agreed to pay certain debts of the firm, including that for which the attachment suit was brought; and that Maiboom thereupon went off, and had nothing more to do with the plaintiff after that time.

The defendant testified that he seized and sold the property on the faith of an assurance by Maiboom that there was no dissolution of the partnership until plaintiff should pay the debts of the firm. The plaintiff is not bound by the statements of Maiboom adverse to his interest, and made in his absence. The testimony is not within the rule that the admission of a partner in a matter of partnership concern is evidence against the firm; for here the existence of the alleged firm is denied, and the testimony was given for the purpose of proving the copartnership. The testimony of Maiboom's statements was not competent, and cannot be regarded as tending to prove the copartnership. Indeed, earlier in the trial the same testimony was offered, and the court very properly rejected it.

Blouquelle was the only witness who testified as to the terms of the settlement between the plaintiff and Maiboom; and we

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think his testimony proves conclusively that the copartnership was dissolved, and the whole title to the property in controversy vested in the plaintiff before the seizure; and that the property was unaffected by any trust which deprived him of an exemption right therein.

According to these views, the instructions asked relating to the question of partnership were properly refused, and there was no occasion to submit the question to the jury.

As regards the value of the property, the plaintiff testified that the beer was worth five dollars per barrel and the hops eight cents per pound, when seized. Other witnesses testified that the beer was worth but three dollars per barrel when sold, and the evidence tended to show that it deteriorated in value after seizure. The value when seized rests upon the testimony of the plaintiff alone, which is uncontradicted. There was, therefore, nothing to submit to the jury on the question of value. A computation will show that the value for which judgment was given was less than that placed upon it by the plaintiff.

We think it was not error for the court to send the jury back to make their finding more specific. This is very common practice. The court was not satisfied with the answer to the second question, and required the jury to find whether the only reason plaintiff gave for demanding the property was that it was his property, and, if he gave any other reason, to find it. That is to say, the court regarded the finding as uncertain, and required the jury to make it certain. This the court may properly do.

The remark of a juror that they could find no other reason for the demand, is not significant. He could only speak for himself, and the fact that the jury found the plaintiff gave another reason therefor, proves merely that the juror changed his opinion. Besides, the verdict, as finally rendered, is abundantly sustained by the evidence. It also shows that the plaintiff substantially claimed the property as exempt.

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Errors are assigned on the rulings of the court rejecting offered testimony. The more material of these rulings, if erroneous, were corrected by the subsequent admission of the rejected testimony. The others we regard unimportant.

We think the record discloses no error for which the judgment should be disturbed.

By the Court. — Judgment affirmed.

NORTHROP VS. GERMANIA FIRE INSURANCE COMPANY.

January 7 — February 3, 1880.

AGENCY: Inconsistent employments.

A person employed by the owner of property as a mere watchman or guard thereof, is not by such employment incapacitated to issue a valid policy on the property in behalf of an insurance company of which he is the agent.

APPEAL from the Circuit Court for *Fond du Lac* County.

Action on a policy of insurance on certain buildings, and machinery and fixtures therein, in Winneconne. On the trial, the court nonsuited the plaintiff. This appeal is by the plaintiff from the judgment of nonsuit.

Geo. E. Sutherland, for appellant, upon the question of agency, argued that it could not be seriously claimed that because an insurance agent had the keys of property left with him, he was incompetent to insure it; that such control of the property was not inconsistent with his duty to the company, but was in fact safer and better for the company; that it is a fact of common notoriety that nearly all real estate agents are also insurance agents, and write policies under like circumstances, and if the rule of the court below were to be adopted and enforced, at least one quarter of the existing insurance would be swept away. Certainly the company itself could issue a valid policy of insurance, though having the property

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in charge; and no valid reason can be assigned why its general agent could not do the same. Again, it appears that Edwards made an entire and perfect verbal contract of insurance with plaintiff's son before he received the keys of the house, when this question could not be raised. The written policy, when issued, related back to the verbal one. *Lightbody v. N. A. Ins. Co.*, 23 Wend., 18; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448. At any rate, the question of Edwards' agency was for the jury, and not for the court. Wood on Fire Ins., pp. 632, 681; 26 N. Y., 460; 61 Pa. St., 107; *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84; *Bebee v. Hartford Ins. Co.*, 25 Conn., 51; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 id., 519; *Rowley v. Empire Ins. Co.*, 36 N. Y., 550; *Rathbone v. Ins. Co.*, 31 Conn., 194; *Hough v. City F. Ins. Co.*, 29 id., 10; *Pierce v. Nashua Ins. Co.*, 9 Am., 235; 50 N. H., 297; *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn., 207; *Sprague v. Ins. Co.*, 69 N. Y., 128. Finally, admitting Edwards to have been plaintiff's agent in effecting the insurance, the contract was not void, but only voidable. The defendant company has received the premium, retains the same, and has not offered to return it. It must therefore be held to have affirmed the contract. *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb., 468; *Mershon v. Ins. Co.*, 34 Iowa, 87; *Washoe Tool Co. v. Ins. Co.*, 66 N. Y., 613; *Lycoming Ins. Co. v. Slockbower*, 26 Pa. St., 199; *Powell v. Factor's Ins. Co.*, 28 La. Ann., 19; *Williamsburg, etc., Ins. Co. v. Cury*, 83 Ill., 453.

For the respondent, there was a brief by *Cottrill, Cary & Hanson*, and oral argument by *Mr. Cottrill*. They argued from the testimony, that Edwards, when he issued the policy of insurance, was acting as plaintiff's agent; and that he exceeded his instructions from the defendant company, and plaintiff, his principal, was chargeable with notice of that fact. They further contended that the same person could not be agent for both contracting parties. *Stewart v. Mather*, 32 Wis., 344;

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Farnsworth v. Brunquest, 36 id., 202; *Meyer v. Hanchett*, 39 id., 419; *Bray v. Morse*, 41 id., 343; *Shirland v. Monitor Iron Works*, 41 id., 162; *Rice v. Wood*, 113 Mass., 133; *Farnsworth v. Hemmer*, 1 Allen, 494; *Walker v. Osgood*, 98 Mass., 348; *Raisin v. Clark*, 41 Md., 158; *Lynch v. Fallon*, 11 R. I., 311; *Scribner v. Collar*, 40 Mich., 375; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Everhart v. Searle*, 71 Pa. St., 256.

LYON, J. The testimony tended to show that the plaintiff, who resided in Ripon, owned considerable real estate in Winneconne, including the insured property; and that, during several years preceding the time when such property was burned, he frequently employed one Edwards, a land agent at Winneconne, and also the general agent of the defendant company there, to collect rents and pay taxes on, and to find purchasers of, portions of such real estate. Edwards was not employed by the plaintiff as his agent in respect to such real estate generally, but was employed from time to time to do specific acts in respect to specific property.

From January to about April 1, 1877, a son of the plaintiff was at Winneconne, and during that time had the sole charge of the insured property, as the agent of his father. In the latter part of March, the plaintiff directed his son to have Edwards insure the property in the Underwriters' Agency, the same as Edwards had formerly insured it, and to give the key of one of the buildings to Edwards, and have him "take charge of and see to all the property in the building." The defendant company is a member of the Underwriters' Agency. Pursuant to the above instructions, plaintiff's son applied to Edwards to insure the property. Edwards agreed to do so, and they arranged that he should retain the premium out of a larger sum in his hands, collected by him for the plaintiff. Edwards stated that he was busy then, but would write the policy the next day, and that in the meantime the property

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was insured. The son then put the property in his charge, and left Winneconne.

Edwards neglected to write the policy until May 7th. A few hours after he had written it, and mailed his report of the transaction to the proper office, the property was destroyed by fire.

We do not say that the above facts are proved, but only that there is sufficient evidence tending to prove them, to support a special finding that they are true. The nonsuit was granted on the sole ground that the uncontradicted evidence proved Edwards to have been the agent of the plaintiff when he wrote the policy. Because he was such agent, the court was of the opinion that he had no authority to write the policy, and hence that the same does not bind the defendant company.

Under the testimony the jury might properly have found that Edwards had no control of the property, except to watch over it and guard it against destruction or injury. For the purposes of this appeal, we must assume that he had no other power over it. Unless it can be held, therefore, that the mere watchman or guard of the property of another, who happens, at the same time, to be an insurance agent, is thereby incapacitated to write a valid policy on the property at the request of the owner, this judgment cannot be sustained. We are aware of no case in which it has been so held — certainly none was cited on the argument; and we are cognizant of no rule of law which incapacitates an insurance agent, thus entrusted with the care of property, to write a valid policy upon it. Indeed, it was well said in argument, that presumably it is for the interest of the insurance company taking the risk that the insured property be watched and guarded by its own chosen agent.

We conclude, therefore, that the nonsuit cannot be supported on the ground upon which the court granted it. We are also of the opinion that no other fact fatal to a recovery

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on the policy is incontrovertibly proved. As the action must be again tried, we purposely abstain from commenting upon other questions which were very ably argued by counsel, lest we might inadvertently prejudice one party or the other on the trial. It is deemed advisable to go no further on this appeal than the present exigencies of the case require us to go, leaving to both parties a clear field for future contest.

By the Court. — Judgment reversed, and cause remanded for a new trial.

TAYLOR, J., took no part.

TROWBRIDGE VS. SICKLER.

January 8 — February 3, 1890.

PRACTICE after reversal of judgment. *Necessity of a remittitur before further proceedings, etc.*

1. After reversal here of a judgment, no further proceedings can properly be taken in the cause in the court below until the record has been remitted to that court; and proper practice requires notice of the filing in that court of the record so remitted to be given to the opposite party before any further proceedings are taken.
2. In this case, therefore, the circuit court having made an order dismissing the action, etc., on the ground that more than a year had elapsed since the reversal of the judgment and the award of a new trial by this court, and that plaintiff (who was respondent in that appeal) had failed to procure a *remittitur* of the record, and had taken no proceeding in the action, such order was afterwards properly vacated on plaintiff's motion.
3. Whether it was the duty of the plaintiff and respondent to pay the costs in this court, and procure a *remittitur*, is not here determined.

APPEAL from the Circuit Court for *Fond du Lac* County.

Replevin. Defendant appealed from an order setting aside an order, previously made on his motion, dismissing the action and directing an assessment by a jury of the value of the property taken by the writ. The case is more fully stated in the opinion.

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For the appellant, there was a brief by *E. S. Bragg*, and oral argument by *S. U. Pinney*. They argued that the statute (R. S., sec. 3072), by its terms, makes an order of dismissal *nisi*.¹ It impliedly requires the party claiming the benefit thereof to call upon the party guilty of laches, to show cause why the order of dismissal should not be made absolute; and the latter, if he do not consent, must show good cause against the same. After the order is made absolute, on notice, the statute is *functus officio*; and though loss come to the party, it is his own fault, and not the result of any defect in the law.

The power to reinstate a cause dismissed in fact under the provisions of this statute is not vested in the circuit court. But if such power is conferred, it can only be upon the same condition precedent which would have prevented a dismissal, *i. e.*, "for good cause shown." The plaintiff was cautioned, two months before the application for dismissal, as to the consequences of his neglect to procure the transmittal of the record; and when the motion was brought up, he was present by attorney and was heard, but offered no excuse or reason and showed no cause why the dismissal should not be made absolute. Neither do the moving papers for reinstatement show any excuse.

Geo. E. Sutherland, for respondent, made the following among other points: 1. Defendant was the appellant, and the successful party on the appeal, and it was his duty to procure the record to be transmitted. 2 *Whittaker's Prac.*, 826; 4 *Wait's Prac.*, 287, § 2. 2. It was irregular to proceed with the assessment of damages while the record was in another court (*Demming v. Weston*, 15 Wis., 236); and this irregularity clearly appears in the fact that the total value of the

¹Sec. 3072, R. S. "In every case in error, or on appeal, in which the supreme court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court, and proceedings had thereon, within one year from the date of such order in the supreme court, or in default thereof the action shall be dismissed, unless, upon good cause shown, the court shall otherwise order."

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property was assessed, instead of defendant's special interest by virtue of the attachment. *Battis v. Hamlin*, 22 Wis., 669; *Lumbering Company v. Tronson*, 36 id., 126; *Booth v. Ableman*, 20 id., 21; *Single v. Schneider*, 24 id., 299; *Warner v. Hunt*, 30 id., 200. 3. The case was noticed for trial by both parties within the year after reversal. This was clearly a step sufficient, within the rule of *Bonesteel v. Orvis*, 31 Wis., 117, and *Walsh v. Dart*, 19 id., 433, to prevent peremptory dismissal. 4. The order appealed from was purely discretionary, and for that reason will not be reversed. *Welch v. Welch*, 33 Wis., 542; *Crerar v. Railway Co.*, 35 id., 67; *McDonald v. G. B. & M. Canal Co.*, 42 id., 335; *Johnson v. Eldred*, 13 id., 485; *McCord v. McSpaden*, 34 id., 541; *Crebler v. Edelbush*, 24 id., 162.

ORON, J. In this case, upon appeal to this court, the judgment was reversed and a new trial ordered; but the record still remains in this court, and has not been transmitted to the circuit court, and no *remittitur* from this court has been filed with the clerk of that court. More than one year had elapsed since the date of such order for a new trial, when, upon motion of the counsel of the appellant, the defendant in the action, the circuit court made an order dismissing the action, and for an assessment, by a jury, of the value of the property taken by the writ of replevin, and such assessment was made. Thereupon, upon motion of the counsel of the respondent—the plaintiff in the action,—the circuit court made the order setting aside such order of dismissal and for such assessment, from which this appeal is taken. The reason given in the motion papers why the *remittitur* from this court has never been made, and the records have not been transmitted to the circuit court, is, that the costs in this court have never been paid; and the appellant insists that it was the duty of the respondent to pay such costs, obtain such *remittitur*, and have the record transmitted to the circuit court, and proceed

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to a new trial in the action, within one year from the date of said order; and that in default thereof the action was properly dismissed by virtue of the statute, now found in section 3072 of the revised statutes.

We do not decide whose duty it was to pay such costs and cause such a transmission of the record to the circuit court. But, assuming that it was the duty of the respondent to do so, we are clearly of the opinion that the circuit court had no jurisdiction to take any such proceedings in the action until it had possession of the record by a *remittitur*. How could the circuit court say, as it does in the recitals of its order of dismissal and for an assessment by a jury: "And it further *appearing* to the court that the action is replevin, and that the property in controversy was seized and delivered to the plaintiff, and the defendant having given notice in his answer of a demand for judgment for the value, instead of for the return of the property; . . . and it further *appearing* that more than one year had elapsed since the reversal of judgment, and an award of a *venire de novo*, by the supreme court" — when that court could legally and properly know such condition of the cause and such proceedings therein *by the record alone*, and no such record was before the court or on file with the clerk? If the appellant wished to move for a dismissal of the action, and thereupon for an assessment by a jury of the value of the property taken by the writ, by reason of such delay, he should first have procured a *remittitur* and transmission of the record to the circuit court, so as to give that court jurisdiction to take such action in the cause.

The statute provides, in section 3067, Revised Statutes, that "when the amount of damages to be paid by the appellant, on affirmance of the judgment or order appealed from, pursuant to any undertaking, is not fixed by the judgment or decision of the supreme court on the appeal, the circuit court may, after the *remittitur* of the record from the supreme court is filed, order a reference to ascertain such damages," etc. And,

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again, in section 3071: "In all cases the supreme court shall remit its judgment or decision to the court from which the appeal or writ of error was taken, to be enforced accordingly." "The clerk of the supreme court shall remit to such court the papers transmitted to the supreme court on the appeal or writ of error, together with the judgment or decision of the supreme court thereon," etc. These provisions clearly show that the circuit court can take cognizance of the cause only upon a *remittitur* of the record filed in that court. The judgment of the supreme court is remitted to the circuit court, together with the record on which it was made, to be there enforced; and they must therefore be brought *formally* to the notice of that court, and, until the judgment of the supreme court is incorporated in its records, no proceedings can be instituted to enforce its directions. *Seacord v. Morgan*, 17 How. Pr., 394; *Lawrence v. Bank of Republic*, 6 Rob., 497; *Vermilye v. Seldon*, 6 How. Pr., 41.

After the *remittitur* has been regularly sent to the court below, and actually filed with the clerk of such court, the supreme court then loses jurisdiction of the cause, and the court below only has jurisdiction therein. *Dresser v. Brooks*, 2 N. Y., 559; *Frazer v. Western*, 3 How. Pr., 235; *Legg v. Overbagh*, 4 Wend., 188; *Cushman v. Hatfield*, 52 N. Y., 653.

The proper practice seems to be, that the *remittitur* from the supreme court is sent to and filed by the clerk of the court below, and notice of such filing given to the opposite party, before any proceedings can be taken in the cause in such court. *McGregor v. Buell*, 33 How. Pr., 450. The statutes of New York, in respect to the judgment roll and to a *remittitur* from the appellate court to the court below, are very similar to our own, and therefore these authorities are applicable.

By the Court. — The order of the circuit court is affirmed, with costs.

TAYLOR, J., took no part in this cause.

Pier vs. Bullis and another.

PIER vs. BULLIS and another.

January 8—February 3, 1880.

PROMISSORY NOTE, with indorsed assignment, converted by payee, and payment made to a person other than the assignee: Presumptions: Notice.

The payee of a note delivered it as collateral security, with his written assignment to the pledgee indorsed thereon, and the pledgee afterwards gave temporary possession of the note for a specific purpose to the payee, who thereupon converted it to his own use, by selling it to one W., to whom the makers paid the note, and took it up. In an action by the pledgee against the makers, *Held*,

1. That, defendants refusing to produce the note, on notice, it must be presumed that when they took it up the assignment indorsed remained un erased and uncanceled.

2. That from the note itself, in that condition, both W. and defendants were chargeable with notice of plaintiff's rights as assignee; mere possession of the note in that state by the payee did not raise any legal presumption of a reassignment to him; the inability of W. to read, or his having in fact overlooked the assignment, would not prevent his being chargeable with notice thereof; the delivery of the note to the payee under such circumstances would not estop the assignee from asserting his ownership; and, in the absence of further evidence, it was error to direct a verdict for the defendants.

APPEAL from the Circuit Court for *Fond du Lac* County.

The case is thus stated by Mr. Justice TAYLOR:

"The defendants gave one H. G. Sampson their non-negotiable promissory note for the sum of \$275, dated on or about the first of January, 1878, and payable six months after date. On the tenth of January, 1878, Sampson delivered the note to the plaintiff, *Pier*, as collateral security for the payment of his note of \$200, given to said *Pier* on that day, and payable three months after date. At the same time he made a written assignment on the back of said non-negotiable note, in the following form:

'For value received, I hereby sell, transfer and assign to C. K. *Pier* the within contract. H. G. SAMPSON.'

"This note remained in the hands of *Pier* until the twelfth

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day of April, 1878. On that day Sampson paid *Pier* \$100 on his note for \$200, and gave him a new note for \$100, payable 90 days after date. This last note remained unpaid at the time of the trial of this action.

“On the same day the following transaction took place between *Pier* and Sampson in regard to the note of *Bullis* and *Robbins*:

“Sampson wanted to sell this note to *Pier*, and he declined buying it. Sampson then said to *Pier*, that if he went on the street he thought he could sell it, and wanted to know if *Pier* was willing to assign it over if he sold it. *Pier* said he was willing to assign as soon as he got his money on the other note. Sampson then wanted *Pier* to take the note over to George Arnold or Mr. Hamilton, or both, to show to them. *Pier* told Sampson he could take it himself, and if they wanted to buy it, they could, and he would make an assignment of it. *Pier* testifies that the arrangement was, in substance, that Sampson should take the note and show it to some men who, Sampson thought, would buy it, and if he could sell, bring it back to him, and he would assign it on being paid the amount of his \$100 note. Sampson took the note, and never returned it, but on the same day sold it to one Weyer; and Weyer took it the next day to the makers, *Bullis* and *Robbins*, and they paid him the amount thereof and took it up. Weyer swore that he held the note of Sampson, on which one Branchand was indorser, for \$200; that he and Branchand knew that Sampson held the note of *Bullis* and *Robbins*, and were anxious to get that note in exchange for the \$200 note he held against Sampson, as *Bullis* had told him if he got their note they would pay him the cash on it. In the purchase of the *Bullis* and *Robbins* note, he gave in exchange Sampson and Branchand's note for \$200, and \$45 cash; and *Bullis* and *Robbins* paid him the money on the note the next day. Weyer swore that he did not see the assignment on the back of the note until after he had given up his \$200 note and paid the

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money; that he then saw something on the back of the note, and asked Sampson what it meant; that Sampson said 'he was hard up this winter, and took up a little money on it; that it was all right; that it was paid.' That the plaintiff had demanded the note of the defendants before the commencement of the action, was admitted by the pleadings.

"Upon this evidence, the circuit judge directed the jury to return a verdict for the defendants. The plaintiff duly excepted to the ruling of the court."

From a judgment in favor of the defendants, plaintiff appealed.

For the appellant, there was a brief by *Shepard & Shepard*, and oral argument by *Geo. E. Sutherland*:

1. The appellant, as pledgor, had a special property in the note, and was entitled to possession thereof against every one, subject only to the payment of the debt by Sampson. Story on Bailm., §§ 287, 299, 303, 352; Edwards on Bailm., 211-12; *Macomber v. Parker*, 14 Pick., 497; *Hays v. Riddle*, 1 Sandf. S. C., 248. 2. The note was delivered back to the pledgor under limited authority only, as special bailee or agent. Such delivery neither vested in him any power to sell and deliver, nor justified defendants or others in dealing with him as possessed of such power. Story on Agency, § 299; *Hollins v. Fowler*, 14 Moak, 138, 171, 172, 175; *Stephens v. Elwall*, 4 Maule & Sel., 259. 3. The pledged note was non-negotiable, and defendants were chargeable with notice of plaintiff's title and of the extent of Sampson's authority. *Dows v. National Exchange Bank*, 91 U. S., 618; *Marine Bank v. Fiske*, 71 N. Y., 353; 2 Kent's Com., 324, 620, 621; Edwards on Bailm., 217; Dunlap's Paley, 202, 207; *Covill v. Hill*, 4 Denio, 323. 4. The possession by Sampson, not being inconsistent with plaintiff's rights, which were shown by the paper itself, raises no estoppel against plaintiff, and gives defendants no rights. *Rowley v. Brown*, 71 N. Y., 85.

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The cause was submitted for the respondent on the brief of *E. S. Bragg*:

Sampson was payee of the note, and no assignment with his signature, on the back thereof, could outweigh his possession. Delivery was a *sine qua non* to a valid transfer of the title, but a written assignment was not an absolute requisite. The purchaser from Sampson paid full value before he knew of the indorsement. He could not read English, but, as soon as he discovered that there was an indorsement, he made inquiry about it, and was informed that the note had been used as collateral and taken up again. The possession of Sampson supported this statement. Plaintiff clothed Sampson with apparent authority, and suffered him to impose upon an innocent purchaser. He cannot be permitted to recover against one who became a victim by his carelessness.

TAYLOR, J. On the part of the plaintiff it is insisted, that the evidence shows that the legal title to the *Bullis* and *Robbins* note was in the plaintiff at the time it was received by Weyer and the defendants; that he was entitled to hold the same as against them and all other persons until his note of \$100, and the interest thereon, which he held against Sampson, was paid; and that the refusal of the said defendants to return the same to him on demand, or pay the amount of his note, was a conversion by the defendants. It is not denied on the part of the defendants, that they would be liable to the plaintiff for the amount of his debt, if, at the time they paid and took up their note, they knew that it had been assigned to the plaintiff by Sampson to secure the payment of such debt, and that such assignment had not been cancelled.

But it is insisted by the learned counsel for the respondents, that the possession of the note by the payee, notwithstanding the assignment by him indorsed on the back thereof, showing that it had been assigned to *Pier*, destroyed the effect of such

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assignment, and that from such possession the law would raise a presumption of a reassignment to the payee. It is probable that the possession of the note by the payee after the assignment had been made, would be a fact which might properly be given in evidence upon the question of ownership; but that fact alone does not amount to even *prima facie* evidence that the title had been restored to the payee. We think the written assignment remaining uncanceled would be much stronger evidence of ownership than the mere possession of the payee.

To illustrate: suppose that *Bullis* and *Robbins* had sold Sampson a horse, and afterwards Sampson had sold the horse to *Pier*, of which fact *Bullis* and *Robbins* had full notice; and that afterwards *Pier* had delivered the horse to Sampson as his bailee for a temporary purpose, and whilst so in his possession they had bought the horse of him and paid him for it: could they claim that they were *bona fide* purchasers without notice of the rights of *Pier*, and that his title to the horse had therefore failed? Most certainly they could not. We think the case at bar presents a stronger case against the right of the defendants to insist that they should be protected because they purchased the property of a person who had once owned it, he being in the possession at the time of their purchase, notwithstanding they knew he had at one time not long before sold the same.

In this case, the purchaser from Sampson, when he placed the property purchased in his possession for a mere temporary purpose, placed with it, in such connection that it could not be severed, plain and ample evidence of his ownership. The property had plainly marked thereon, so as to be readily seen by any one dealing with the party in possession, the name of the real owner. The note with the assignment on the back, unexplained, was clear proof that the title had passed out of the payee, and consequently out of the party in possession. The defendants having refused to produce the note and assign-

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ment, and having failed to give any proof in relation thereto, it must be presumed that the assignment on the back thereof, at the time they purchased it or took it up, was in the same condition as when it left the hands of the plaintiff—neither erased nor cancelled.

The evidence of the transfer of the title by the payee to a third party being perfect, his possession would be no more evidence of title in him than if found in the possession of some other party, and the possession by a third person would be just as much evidence that he had purchased the property of the assignee as the possession of the payee. In either case, in order to sustain the title of the party in possession, there must be proof of a purchase from the assignee, or proof showing that the assignment never took effect as such.

A stranger could make a good title, notwithstanding the assignment, by parol proof that he purchased the same of the assignee; but to sustain his title as against the rights of the assignee, he would either have to prove such purchase, or that the assignment for some reason had never operated to pass the title to the assignee; and it would take the same kind of proof to sustain the title of the payee against his own assignment.

It cannot justly be said that the plaintiff, by his delivery of the note to the payee under the circumstances detailed in the evidence, was guilty of any fault, or that he in any way clothed the payee with the evidences of ownership, and that he should therefore be estopped from asserting such ownership against a third person dealing with the payee. He was careful to send with the note his evidence of title and ownership, so attached to the note itself that no man of any business capacity could fail to discover it; and there must have been a want of ordinary care on the part of the person purchasing it, if he did not discover that the payee and possessor did not own it. It was no excuse for Mr. Weyer, if it be true, that he could not read the assignment, or did not see it. It was

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where a man in the exercise of ordinary care would have seen it; and if he neglected to exercise such ordinary care in making the purchase, he, and not the plaintiff, must suffer for his neglect. The evidence given by the plaintiff tending to show that the defendants and their immediate vendor had or were charged with notice of the ownership of the note by the plaintiff, was ample to carry the case to the jury.

It is evident from what has been said, that it was error on the part of the court to direct a verdict for the defendants.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

BERGENTHAL VS. FIEBRANTZ.

December 16, 1879 — February 24, 1880.

PRACTICE: BILL OF EXCEPTIONS. (1) *How question of regularity in settling bill of exceptions must be raised.*

CONTRACT: AGENCY. (2) *Settlement of disputed claim, by agent.*

1. When the judge of the court below settles and signs a bill of exceptions upon an appeal, he thereby determines the regularity of the proceedings preliminary thereto; and such determination cannot be reviewed upon that appeal; but the remedy is by motion to strike the bill from the files. *Oliver v. Town*, 24 Wis., 512; *Sexton v. Willard*, 27 id., 465.
2. Where a disputed claim was presented to the agent of the alleged debtor, in charge of his business and authorized to pay his debts, which claim was probably not enforceable by suit but rested only in moral obligation, and it was presented in good faith, without fraud or misrepresentation, and the agent, with knowledge of all the material facts, compromised the claim, and settled it by payment of a smaller sum: *Held*, that the principal could not recover the sum paid.

APPEAL from the County Court of *Milwaukee* County.

Action to recover \$300 alleged to have been paid to the defendant by one William Bergenthal, the agent of the plaintiff, for the plaintiff, through a mistake of fact arising from a misrepresentation of the defendant.

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The complaint alleges that in 1875 the plaintiff was in Europe, and William Bergenthal, his brother, had in his absence the general charge and management of his business in Milwaukee; that the defendant stated and represented to William, while so acting for the plaintiff, that the latter was indebted to him in the sum of \$300, on account of an alleged transaction for the purchase or sale of salt theretofore had between them, and demanded that sum of William as plaintiff's agent; that William had no knowledge of the transaction, but, relying upon the truth of defendant's statement, paid defendant, for the plaintiff, the money demanded; that plaintiff was not indebted to the defendant in any sum; that the money was paid by William through a mistake as to the fact of such indebtedness; and that repayment of the sum so paid has been duly demanded of the defendant.

The answer alleges that at the time mentioned in the complaint the plaintiff and William Bergenthal were partners engaged in the business of distilling in Milwaukee; that their distillery had been theretofore seized by the United States for nonpayment of some tax or assessment upon it of over \$5,000, and was advertised to be sold; that, at the time and place appointed for the sale of the distillery, the defendant attended, intending to bid therefor \$4,000, and prepared to pay the amount of his bid; that thereupon, after some negotiations, William Bergenthal offered the defendant \$300 if he would not bid on the property; and that defendant accepted the offer, and the money was then and there paid to him by William, which is the same money sued for in this action. And it further alleges that the distillery was offered for sale at public auction by the proper officer; that the defendant did not bid, but the United States bid therefor \$2,000, and a brother of the plaintiff bid \$2,001, whereupon the property was declared sold to the latter.

The answer also alleges that plaintiff is indebted to defendant in the sum of \$300 on account of an executory contract

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made in 1865 for the sale and purchase of a quantity of salt, which contract plaintiff failed to perform.

Except as above, the answer is a general denial.

It appeared by the evidence given on the trial, that plaintiff's distillery was seized in 1875 and sold by the United States for nonpayment of a tax or assessment upon it of \$4,500; that at the sale there were but two bids, one in behalf of the United States, of \$2,000, and the other by a brother of the plaintiff, of \$2,001; that the defendant was present at the sale but made no bid, and William Bergenthal paid him the \$300 in controversy immediately after the sale. As to whether the \$300 was paid to the defendant on the salt transaction, or in consideration that he would not bid on the distillery, the testimony is conflicting.

The plaintiff testified that he was not indebted to the defendant in 1875, or at any other time; also, that in 1860 or 1861 he agreed to sell defendant two hundred barrels of salt at a stipulated price, provided he had the same in his warehouse in Winona; but it turned out that he had none, his agent having sold all the salt the plaintiff previously had there. He further testified that after the making of such conditional agreement the price of salt advanced.

The defendant testified that the contract for the sale and purchase of the salt was unconditional, and that after his failure to deliver the salt the plaintiff promised to pay him the difference between the contract and market prices thereof, but never paid it. He denied that the \$300 was paid him on account of the salt transaction, but testified that it was the agreed consideration for not bidding on the distillery.

The testimony of William Bergenthal, as to the circumstances under which he paid the defendant the \$300 (referring to the time the distillery was sold), is as follows:

"Don't know how many bids; heard two — United States and my brother. Don't know that I heard more. Don't know what all the people came there for. Saw defendant and

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had conversation with him on that day. Defendant stood there, and when he saw me he said, 'Now I have a chance, and I am going to get even with your brother,' and he had been looking for that. Before the distillery; we were sitting on a bench. Had been looking for that chance last ten years. I says, 'What is it?' He says, 'He owes me \$300 for a salt transaction in Winona.' I says, 'How long ago?' He says, 'About thirteen years ago.' I said, 'Why didn't you see him; he has been here all the time?' He said, 'Well, he would not, but now was the time to get even with him.' I went back and told Lindwurm this, and Lindwurm said he didn't believe that. I said, 'I will go and ask him again, and if he says he owes it to him I will pay it.' Went and asked defendant if it was so; that if coming from my brother in a right way, I will give you that. 'No,' he said, 'I want \$500; the interest amounted up to that.' I said, 'I will give you that if you take the \$300.' He says, 'All right,' and I gave it to him. Had no check with him—will give the money when we get home; and stepped in the saloon at Roden place, and brother August wrote out the check made to his order, and I signed it."

The foregoing is taken from the printed abstract, which is believed to be substantially correct.

Concerning the alleged indebtedness of the plaintiff to the defendant, and in answer to the question, "Did he ask you to pay it?" the same witness testified as follows: "No, not in those words; said he was going to get even with my brother on account of that salt transaction for \$300; looking for a chance, and now was a chance. Asked why he did not sue him when he was here; said he wouldn't sue him. I said, 'If he owed you fair and square, I will pay you \$300.' He asked interest. I said, 'No; if you want \$300, I will give it to you.' . . . He said interest about \$200, and wanted \$500. . . . Brother authorized me to pay his debts before he left." There was other testimony of similar import.

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A motion for a nonsuit was denied. The jury returned a verdict for the plaintiff for the amount of his claim. The court denied the defendant's motion for a new trial, and rendered judgment pursuant to the verdict; from which the defendant appealed.

J. J. Orton, for the appellant.

For the respondent, there was a brief by *Murphey & Goodwin*, and oral argument by *Mr. Goodwin*.

LYON, J. Return was made on the present appeal before a proper bill of exceptions had been settled, and, on motion of counsel for the appellant, by order of this court, the record was remitted to the county court for the purpose of obtaining a further return. The object of the order was to have the bill of exceptions attached to the record and returned, but it was not so expressed in the order. The learned county judge seems to have been in doubt as to the purpose of the order, but by his direction a further return has been made consisting of a large mass of testimony certified by the reporter to be a complete and correct transcript of the testimony given on the trial of this action, together with what purport to be certain questions proposed on behalf of the appellant to be propounded to the jury, and the charge of the judge to the jury. The reporter's certificate was followed by these words: "This was all the testimony."

To the foregoing matter, the judge appended the following certificate:

"The foregoing, from the certificate of the reporter, appears to be all the proceedings had upon the trial of said cause, and if the appellant's prayer for a further return includes and means the foregoing proceedings, the clerk of this court may attach the same to the original bill of exceptions, and make return of the same with the original bill, and return the same to the supreme court in pursuance of the order of said court made the second day of May, 1879. The original or copy of

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application not being before me, the substance of the same not being included in the order, I am at a loss to know what return to order the clerk to make, but suppose it to mean the testimony and proceedings had upon said trial, including the charge of the court; and hence the clerk is ordered to return the same as above.

“To which the plaintiff objected, for the reason that no copy of the foregoing testimony and proceedings has been served in this action, and the respondent has not had an opportunity to examine the same; that the order made by the supreme court in said action as to a further return has not been complied with; and that no notice of the settlement or change of the bill of exceptions has been given, as required by law; that respondent appears for the purpose of entering these objections at this time, and for no other purpose, and said order is made, as above, subject to said objections and exceptions.”

It is now objected that the alleged bill of exceptions was not properly settled as such — in fact, that it is not a bill of exceptions. The certificate of the judge is very peculiar, and we have had some difficulty in determining whether or not he intended to certify that the testimony returned here was actually given on the trial. The certificate should have been more direct in its terms. However, we cannot think that the judge would order the clerk of his court to send here such a mass of written matter unless he intended so to certify it that it would be part of the record in the case. Hence, without stopping to analyze the certificate, we must hold that the documents to which it is annexed constitute a bill of exceptions in the cause, and that it contains all of the testimony given on the trial.

When the county judge settled and signed this bill, he determined the regularity of the proceedings preliminary thereto, and we cannot review such determination on this appeal. If a bill of exceptions is not properly settled, the remedy is by

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motion to the proper court to strike it from the files. This practice was adopted in *Oliver v. Town*, 24 Wis., 512, and in *Sexton v. Willard*, 27 Wis., 465. In each of these cases the bill was defective on its face; but no good reason is perceived why the same practice should not prevail in any case wherein, for any reason, a party desires to expunge from the record what purports to be a bill of exceptions, or to impeach its verity. This brings us to the merits of the case.

The jury were instructed that if the defendant fairly and honestly intended to bid on the distillery, and the \$300 was paid to him in consideration that he would refrain from bidding, the contract was an illegal one, and there can be no recovery in the action. Under this instruction the verdict for the plaintiff necessarily negatives the claim of the defendant that the money was paid as the consideration for not bidding at the sale of the distillery. We have, therefore, no concern with that branch of the case. Under the pleadings, evidence and charge of the court, the jury must have found that the money in controversy was paid the defendant on account of the alleged contract for the sale and purchase of salt as claimed by the plaintiff, and that the same was paid by William Bergenthal under a mistake of fact.

All the knowledge William had of the salt transaction, he obtained from the defendant on the occasion of the sale of the distillery; hence, if the money was paid under a mistake of fact, the mistake was produced by the misrepresentations of the defendant to William of the facts of that transaction. If the money was paid by William for the plaintiff under these circumstances, the plaintiff is entitled to recover. Add. on Con., 42. Therefore, the controlling question is, Does the evidence tend to prove that the defendant misrepresented the salt transaction to the plaintiff's agent? If the evidence tends to prove this, the judgment should be affirmed; otherwise, it must be reversed.

The evidence furnishes no reason to doubt that the defend-

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ant honestly believed that the plaintiff was indebted to him on account of the salt transaction. He stated to the agent that the plaintiff owed him \$500 on that transaction (including interest), but was not asked and did not give the particulars of it. It is quite apparent that he did not assert that he had a legal claim upon the plaintiff for the money; for he refused to sue the plaintiff therefor when that course was suggested by the agent, and he disclosed that the statute of limitations had probably run against the claim twice over. He also disclosed sufficient to inform the agent that the plaintiff did not recognize the validity of the claim and would not pay it. He demanded \$500; the agent offered him \$300, and he accepted the offer.

It seems to us that the case stands as it would had the defendant said to the agent, "Your brother *Francis* is honestly indebted to me in the sum of \$500, principal and interest, on account of a salt transaction between us thirteen years ago. He denies the indebtedness, and will not pay it. I will not sue him for it, because I cannot recover the money by suit. I demand, however, that you pay me for him the amount of my claim, because I believe it is an honest one."

We find in the record no evidence of the misrepresentation of any material fact by the defendant, or that the money was paid through any mistake of fact on the part of the plaintiff's agent. The defendant seems to have disclosed truly all that good faith required him to disclose in the first instance; and if the agent desired to know more of the transaction than was thus disclosed, he should have interrogated the defendant concerning it. His failure to do so was equivalent to saying to the defendant: "You say your claim is an honest one. I do not care to know the particulars of the transaction out of which it arose, or what my brother thinks or has said about it; for I know you cannot recover it by suit, and you assure me that you will not bring suit for it. You demand \$500. I will pay you for my brother \$300 to settle it, because I am satisfied the claim is honestly made."

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We have here, therefore, the case of a disputed claim of \$500 against the plaintiff (probably not enforceable by suit, but resting in a moral obligation alone), made in good faith by the defendant, which, with knowledge of all the material facts and without fraud or misrepresentation on the part of the defendant, the agent of the plaintiff, acting for him, compromises and settles by paying \$300 in full discharge of it.

This is the case made by the plaintiff's testimony, by which he is bound; and we think that it conclusively appears that the payment of \$300 was a valid and effectual compromise of a disputed claim, which neither party can impeach.

Because it appeared from the testimony of the plaintiff that he is not entitled to recover back the money sued for, the motion for a nonsuit should have been granted; or, that being denied, the motion for a new trial should have been granted.

By the Court. — Judgment reversed, and cause remanded for a new trial.

 PETESCH VS. HAMBACH and another.

January 7 — February 24, 1880.

REFORMATION OF MORTGAGE *executed by husband and wife, so as to make it include the homestead, omitted by mistake.*

1. A written instrument will be reformed, for fraud or mistake, only so as to give effect to a previous binding contract of the parties; though *it seems* that this rule is not inconsistent with such reformation of an instrument where the executory agreement was oral and within the *statute of frauds*.
2. Where a mortgage of land of a married man, executed by him and his wife, and taken by the mortgagee as security for moneys loaned to the husband, with the understanding and belief of all parties that it was a mortgage of the homestead, was found to be of other lands only: *Held*, that the instrument cannot be reformed as against the wife, after the husband's death (where the homestead had descended or been devised to her); nor would it have been reformed even as against the husband in his lifetime, since, by the statute, it would have been void without the wife's signature.

COLE and TAYLOR, JJ., dissented. RYAN, C. J., was absent.

48	443
74	586
48	443
79	160
48	443
104	86

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APPEAL from the Circuit Court for *Sheboygan* County.

The action is to reform a mortgage. The facts found by the circuit court, so far as it is necessary to state them, are as follows:

In 1875, one Peter Petesch was the owner of lots A and B in a certain block in the village of Random Lake. Lot A was his homestead, on which he and his wife resided. Peter obtained a loan of \$800 of the plaintiff, under an agreement to secure the repayment of the same, and the interest, by a mortgage on lot A. A mortgage was accordingly drawn and executed by Peter and his wife, all parties supposing it to be upon the homestead lot. It was afterwards discovered that it was upon lot B instead of lot A — so drawn by mistake. Lot B is of small value, is inadequate security for the mortgage debt, and the parties did not intend to include it in the mortgage. Peter died in 1876, and the homestead descended to his widow as his only heir-at-law, or it was devised to her. In 1877, the widow married *Jacob Hambach*, and soon thereafter conveyed the homestead to him through an intermediate party. The conveyance was not made upon a valuable consideration. This action was brought against *Jacob Hambach and his wife* (late Mrs. Petesch) to correct the mortgage and constitute it a lien upon lot A. The circuit court denied the relief prayed, and gave judgment dismissing the complaint, with costs. The plaintiff appealed from the judgment.

The cause was submitted on the brief of *W. H. Seaman* for the appellant, and that of *Frisby, Weil & Barney* for the respondent.

For the appellant it was argued, 1. That the defendant *Margaret Petesch Hambach* became possessed of the premises as heir or devisee of her deceased husband. Her rights as widow merged in the greater estate thus acquired; and as such heir or devisee she can maintain no defense not permitted to her devisor. Asserting the benefits of full ownership, she must be charged with its burdens, and cannot be permit-

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ted in a court of equity to enjoy the fruits of the bequest and at the same time to employ her former inconsistent position as a means of wronging the plaintiff. *Norton v. Nichols*, 35 Mich., 148. 2. That, conceding to *Mrs. Hambach* the same *status* which she occupied prior to taking under the devise, the relief sought may still be had. There is not here an entire want of a mortgage, as in some cases cited by respondent, where there was a failure in some of the statutory requirements necessary to validity. The mortgage is in every respect valid, but it does not represent what the parties intended. Appellant asks that it may be made to speak the truth. All that is required is a decree of court declaring the intention — the truth of the instrument; and the mortgage then stands as the original act of the parties. While equity may not supply the non-execution of an instrument, it will aid a defective execution. The cases of *Shroyer v. Nickell*, 55 Mo., 264, and *Martin v. Hargardine*, 46 Ill., 322, have extended the rule against reformation to cases which are clearly beyond its reason and application; and relief can well be granted here without violation of any settled doctrine and entirely in accordance with the rules and disposition of equity jurisprudence. *Hamar v. Medsker*, 7 Cent. L. J., 77. It is immaterial that the premises constitute a homestead; for, as decreed, the mortgage would be the same which *Mrs. Hambach* did execute *in animo*. 3. That the provisions of our statutes and decisions of this court seem ample to give a married woman a status among contracting parties. *Heath v. Van Cott*, 9 Wis., 516; R. S., sec. 2222.

For the respondents it was argued, among other things, 1. That the evidence is not so clear and convincing as to warrant a reformation under the rule adopted by this court. *McClellan v. Sanford*, 26 Wis., 595; *Newton v. Holly*, 6 id., 592; *Lake v. Meacham*, 13 id., 355; *Fowler v. Adams*, id., 458. As the principal party to the transaction, Peter Petesch, is dead, much stronger testimony should be required

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than if he were living. 2. That this action is in the nature of one for a specific performance of the original contract between plaintiff and the deceased. *Martin v. Dwelly*, 6 Wend., 9; *Hait v. Houle*, 19 Wis., 472; *Dickinson v. Glenney*, 27 Conn., 104. That being the case, defendant's status is not changed by the married woman's act, but, as respects her husband's property, she stands as at common law. *Heath v. Van Cott*, 9 Wis., 516; *Erwin v. Downs*, 15 N. Y., 575; *Yale v. Dederer*, 18 id., 265; Kerr on F. & M., 149, 150; Tyler on Inf. and Cov., 315; *Rogers v. Weil*, 12 Wis., 664; *Conway v. Smith*, 13 id., 125; *Todd v. Lee*, 15 id., 365. Hence the parol contract was void as to her, and equity will not reform thereby. *Carr v. Williams*, 10 Ohio, 305; *Purcell v. Goshorn*, 17 id., 105; *Davenport v. Sovil's Heirs*, 6 Ohio St., 459; *Miller v. Hine*, 13 id., 565; *Martin v. Hargardine*, 46 Ill., 322; *Shroyer v. Nickell*, 55 Mo., 264; 7 Cent. L. J., 182; *Grapengether v. Fejervary*, 9 Iowa, 163, 173. The statute makes, not the assent of the wife, but her signature to a conveyance of the homestead, necessary to its validity. When the husband, by the instrument, fails to alienate, a court of equity cannot do for him what he had not done, and carry the wife's signature from an imperfect or void deed to a perfect one. In Ohio the legislature have authorized the courts to do, in this respect, what they otherwise had no power to do; but until our legislature shall confer a like power upon the courts of this state, they cannot exercise it. 3. The mortgage cannot be reformed as to the husband so as to be effectual as a mortgage of the homestead, unless it be also reformed as to the wife, her signature being absolutely essential to a conveyance of any interest or estate whatever in the homestead.

LYON, J. An essential condition upon which a court of equity will reform a written instrument is, that the parties thereto have made a binding contract, which they mutually agreed to incorporate in the instrument, but which, through

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fraud or mistake, they failed to do. The original contract must be valid, or no reformation of the instrument will be decreed, however clearly the mistake be established. It was said by Lord HARDWICKE, in *Henkle v. The Royal Ex. Assurance Company*, 1 Ves. Sen., 317, that if the contract relates to an illicit subject, the relief will not be granted. In *Eaton v. Eaton*, 15 Wis., 259, this court refused to reform a voluntary deed by compelling the grantors to affix a seal. Mr. Justice PAINE, delivering the opinion of the court, said: "It is well settled that equity will not interfere to enforce a voluntary contract to convey. *Smith v. Wood*, 12 Wis., 382. *A defective attempt to make a voluntary conveyance stands upon the same ground.*"

In the opinion by DIXON, C. J., in *Hanson v. Michelson*, 19 Wis., 498, it is said: "It is a familiar rule that a defective deed may be treated in equity as an agreement to convey, and performance enforced; and where it is, we think, as was held in *Eaton v. Eaton*, that it stands on the same footing as an executory contract to convey, and that it will not be carried into effect by a court of equity if it appears to have been made without consideration." In the late case of *Sherwood v. Sherwood*, 45 Wis., 357, the power of the court to correct a mistake in a will was denied. One of the grounds of the judgment is thus stated: "The reason why courts of equity will not interfere in such cases seems to be, that an action to reform a written instrument is in the nature of an action for specific performance, and the making of a will being a voluntary act there is no consideration, as in actions to reform deeds or contracts, to support the action. Hence it is said in a note by the editor of Wigram's Treatise on Extrinsic Evidence in Aid of Wills, that 'volunteers under wills have no equity whereon to found a suit for specific performance.' " In *Hunt v. Rousmaniere's Adm'rs*, 1 Pct., 1, it is said that "the execution of agreements fairly and legally entered into is one of the peculiar branches of equity jurisdiction; and if

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the instrument which is intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as the other, by compelling the delinquent party to perform his agreement according to the terms of it, and to the manifest intention of the parties." (page 13.)

The above citations, which might be increased almost indefinitely, are sufficient to show that an action to reform a written instrument is in the nature of an action for specific performance, and relief is granted therein on the same principles. Also that an instrument not founded upon sufficient consideration — that is, a mere voluntary instrument — will not be reformed; neither will an instrument be reformed to express a contract which originally was *nudum pactum*. Indeed, the authorities on this subject, both in this country and in England, all seem to be one way.

There has been some conflict of decision in the application of the principles above stated to cases where the contract omitted from, but sought to be embodied in, the reformed instrument, was, while resting in parol, void by the statute of frauds. Such a case would arise, if, from a conveyance executed in attempted compliance with a parol contract for the sale and purchase of land, the land intended, or some part thereof, should be omitted by mistake.

In Massachusetts and Maine, and perhaps in some other states, it has been held that the conveyance cannot be reformed unless there is a valid, to wit, a written, executory contract of sale to reform by. *Glass v. Hulbert*, 102 Mass., 24; *Elder v. Elder*, 10 Me., 80. To the same effect are the cases of *Osborn v. Phelps*, 19 Conn., 63, and *Best v. Stow*, 2 Sandf. Ch., 298. Some of these cases concede the right of the defendant resisting specific performance to show by parol that

the instrument sought to be enforced does not correctly express the agreement of the parties, but deny the same right to a plaintiff seeking reformation of an instrument.

It is said by Professor Pomeroy, in his late treatise on the specific performance of contracts, that the preponderance of judicial authority in this country supports the opposite doctrine, to wit, that the statute of frauds is no impediment to the reformation of a conveyance; and in his notes to section 204, he cites numerous cases in support of that proposition. But the learned author states (no doubt correctly) the ground upon which these decisions rest. He says: "The statute of frauds is no real obstacle in the way of administering equitable remedies, so as to promote justice and prevent wrong. Equity does not deny or overrule the statute; but it declares that fraud — and the same is true of mistake — creates obligation and confers remedial rights which are not within the statutory prohibition — in respect to them the statute is uplifted." Section 266, page 350.

This is but another mode of saying that, notwithstanding the statute of frauds, there is in such a case a valid and binding executory contract, which the parties intended and attempted to embody in the instrument sought to be reformed, but failed to do so. Hence the cases which uphold the reformation of written instruments in proper cases, without regard to the statute of frauds, are in entire harmony with the rule above stated that there must be a valid binding contract to reform by, or reformation will not be decreed.

In general, by the principles of the common law, a *feme covert* can do no act to bind herself; she is said to be *sub potestate viri*, and subject to his will and control. Her acts are not, like those of infants and some other disabled persons, voidable only, but are, in general, absolutely void *ab initio*. *Elliott v. Peirsol*, 1 Peters, 338. Because of her disability to contract, it has uniformly been held that if a wife join her husband in the execution of a defective conveyance, such con-

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veyance cannot be reformed as to her, unless by virtue of an express statute. The cases to this effect will be found cited in the argument of counsel for the defendants.

Hamar v. Medsker, 60 Ind., 413, is relied upon by counsel for appellant to sustain this action. In that case a married woman owned land in her own right, sold it, and received the purchase money therefor. She executed a conveyance to the purchaser, in which her husband joined, but by mistake the land actually sold was not described therein. A statute of that state is as follows: "No lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom shall be her separate property, as fully as if she was unmarried; *provided*, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join."

The action was to reform the deed so that it should convey the land actually sold, and it was so reformed. There was no argument by counsel against the power of the court to correct a mistake in the deed of a married woman. The opinion asserts that "the lands of a married woman can be conveyed or encumbered in no other mode than that prescribed by the statute; and her agreements in relation thereto, not executed in the manner prescribed by the statute, are void;" but says that by the correction of the deed the object and policy of the statute are not contravened or thwarted, because the husband joined in the defective deed. The decision stands alone, and the reasoning upon which it is rested is not sufficiently strong and convincing to justify us in accepting the adjudication as authority. We should be better satisfied with it had the court applied another principle of equitable jurisdiction, and decreed that, because the land sold was the separate estate of the wife, and because she had received the purchase money therefor, the purchaser should have a lien upon the land purchased for the amount he paid on account of the purchase.

An article in 7 Cent. L. J., 182, reviews this Indiana case,

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and points out with clearness and force the fallacy of the argument upon which the decision is rested, and the unsoundness of the decision. This article also cites many cases on the general question, which it has not been thought necessary to cite in this opinion. Other articles on the subject are contained in the same periodical in vol. 7, p. 434, and vol. 8, p. 42, maintaining, with considerable ingenuity of argument, the doctrine of the Indiana case. But we think the writers have signally failed to give any sufficient reason for destroying the old and well established landmarks of the law in this behalf.

If the land which it is claimed should be included in the mortgage sought to be reformed in this action, was the separate estate of the wife, and especially if she had received to her own use the money which it was given to secure, in view of our statute, which removes the disability of coverture and enables the wife to contract in respect to her separate estate the same as though she were sole, it may be that the mortgage might be reformed as against her. However, this is not here decided. Again, had not such land been a homestead, no doubt the mortgage should be reformed as to the interest therein of the husband, but not to affect the dower right of the wife.

But the land affected by the action being a homestead, the husband was under legal disability to mortgage it without the signature of the wife to the mortgage. Without her signature a mortgage executed by him is invalid. Hence, a reformation of the mortgage as to him, or his heir, or the devisee of the land, without reforming it at the same time as against the wife, would be wholly inoperative for any purpose.

The homestead in controversy belonged to the husband. The wife had no *estate* in it by virtue of the homestead right. She had only an absolute veto upon the power of her husband to alienate it, which the statute executes for her until she sees fit to affix her signature to her husband's conveyance of it. *Godfrey v. Thornton*, 46 Wis., 677. Our statute only removes

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the disability of coverture in respect to the separate estate of the wife. This homestead not being the separate estate of the wife, it is clear that she was under the common-law disabilities of coverture when she signed the defective mortgage. Being so, she could only validate her husband's mortgage of the homestead by signing it. She has signed no such mortgage, and could not make a valid executory agreement to do so. Hence, there is no ground upon which a judgment to reform the mortgage can legally be rendered.

The death of Peter Petesch, and the fact that the homestead descended or was devised to his widow, are not important; neither is her subsequent marriage with the defendant *Jacob Hambach*, or the conveyance of the homestead to him. The case stands precisely as it would have stood had the action been brought in the life-time of Peter, against the mortgagors, and must be determined on the same principles.

We have studied attentively the very able argument of the learned counsel for the plaintiffs, and the authorities which he cites. We agree with him that on principles of natural equity the plaintiff ought to have relief, and should be better satisfied could we award it to him; but we are denied that satisfaction by inexorable rules of law, which we may not disregard. We must affirm the judgment of the circuit court.

ORTON, J., concurred.

COLE and TAYLOR, JJ., dissented.

RYAN, C. J., was not present.

COLE, J. I am constrained to dissent from the decision in this case. It is said that an action to reform an instrument for a mistake is in the nature of a suit for specific performance of a contract, and that no performance will be enforced against a married woman because her contracts are void. Whatever reason there may have been in this rule formerly, I think it fails upon the facts of this case, in view of the legislation of this state. The common-law disabilities of married

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women, so far as their separate estate is concerned, is entirely removed by statute. She may make contracts relating to such estate in the same manner and to the same extent as though she were sole, and subject herself to all legal and equitable remedies on such contract. As early as *Conway v. Smith*, decided nearly twenty years ago, it was held that a married woman was liable in an action at law on a note executed by herself and husband, to pay for improvements on her separate estate; and the doctrine of that case has been repeatedly affirmed since. Indeed, at the present term we have decided that a married woman, having no separate estate, may purchase upon credit a farm, carry it on, and have the benefit of the crops, thus acquiring a separate estate. *Dayton v. Walsh*. See, also, *Meyers v. Rahte*, 46 Wis., 655. Thus, in respect to her own property, a married woman has precisely the same legal capacity to make contracts as a single woman.

I refer to this legislation for the purpose of observing that decisions in actions for the specific enforcement or reformation of contracts executed by husband and wife, where the common-law disabilities of coverture exist, are to be applied with much caution to their contracts made in this state. The property intended to be mortgaged in this case was the homestead of the husband. By our statute, a mortgage or other alienation by a married man of his homestead is not valid without the signature of the wife to the same. In *Godfrey v. Thornton*, 46 Wis., 677, it was held that this statute did not vest any estate in the wife, living the husband, in the homestead, but operated only as a disability of the husband, living the wife, to alienate his homestead, without her consent, evidenced by her signature to his alienation. In this case, the wife did consent to the husband's mortgaging his homestead. She evidenced that consent by signing and acknowledging the mortgage, which, as the court below found, was intended by all parties to include the homestead.

Why, then, should not the mortgage be reformed so as to

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correct the mistake in the description, and make it express the real contract of the parties? It is said that this cannot be done, because the wife, *quoad* the homestead, stands where she did at common law, subject to the same disabilities. But if this is so, what is the object of the statute making the alienation of the homestead by the husband valid, with her consent evidenced in writing? Is there no efficacy in that statute; no power to contract conferred by it upon the wife? Certainly, it makes the written assent of the wife essential to the validity of the husband's alienation; it is potent to change to that extent, at least, the common-law *status* of the wife. Upon the facts, I can see no objection whatever to correcting the description of the property so as to make the mortgage include the premises which all parties intended and supposed it did include when executed. On the decease of the husband, the wife became possessed of the property as heir-at-law. After being so possessed, she recognized the validity of the mortgage by taking out a policy of insurance on the premises, making the loss payable to the mortgagee. If she really had no power whatever to make a contract in the first instance, these circumstances might not increase the equities of the mortgagee; but as it is, they tend to show the contract the parties intended to make. The intent being clearly proven, the wife having consented to the husband's mortgaging his homestead, the mortgage should be corrected to express the contract of the parties.

In *Schmitz v. Schmitz*, 19 Wis., 207, an action was brought to correct a mistake in the description of a mortgage executed by a husband and wife on the homestead. The mistake was corrected in the court below so as to carry out the intention of the parties to the instrument. On appeal to this court, the point was made that the mortgage could not be corrected or reformed, because it was executed by a married woman. But the court did not have occasion to pass upon the question, as it held that the evidence in the case clearly identified the

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premises embraced in the mortgage as being the same before as after the correction, so that the defendants could not have been injured by the correction. In *Smith v. Armstrong*, 24 Wis., 446, husband and wife contracted as vendors of land, and a specific performance of the contract was enforced in favor of the vendee. True, there was no question made as to the power of a married woman to make the contract; it seems to have been assumed that she had such power, and that a court of equity would enforce her contract in that behalf. Other cases of like effect may be found in our reports, where the question as to the validity of a contract of a married woman does not seem to have been raised. These cases only have a negative value, perhaps. But my intention was not to discuss the question at length, but only state some of the reasons why I dissented from the decision.

On an equal division of the justices present and acting in the determination of the appeal, the judgment below was affirmed.

BROOKS, Executor, vs. NORTHEY and another.

February 3 — February 24, 1880.

Waiver of objection to order of revivor.

Where plaintiff dies while the cause is pending on demurrer to the complaint, and the court makes an order reviving the action in the name of one who petitions therefor as executor of such deceased, and defendant afterwards appears and argues the demurrer, without moving to set aside the order, either for want of notice to him of the petition, or on the ground that such order was made without sufficient evidence of the petitioner's representative character, this is a *waiver* of those objections.

APPEAL from the Circuit Court for *Grant* County.

The action was commenced by the plaintiff's testator, Olonzo Carson, upon a joint and several promissory note made to him by the defendants. The complaint appears to

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be in the usual form, and is duly verified. The defendants interposed a general demurrer thereto.

Pending the demurrer, Carson, the original plaintiff, died. Thereupon the present plaintiff filed an affidavit of Carson's death, stating therein that "this affiant has been duly appointed the legal executor of the estate of the said plaintiff," and praying that the action be revived in the name of the affiant as plaintiff. The court ordered accordingly. No notice of the application to revive the action was served upon the defendants or their attorney.

Afterwards the defendants appeared and argued the demurrer without objection to the regularity of the revivor proceedings. The court overruled the demurrer, and gave defendants leave to answer in sixty days. On due proof of their failure to answer within the time prescribed, the court gave judgment for the plaintiff for the sum due on the note by its terms, and for costs; and from this judgment the defendants appealed.

For the appellant, there was a brief by *Hazelton & Provis*, and oral argument by *O. B. Thomas*.

J. T. Mills, for the respondent.

LYON, J. The failure of the plaintiff to give notice to the defendants of the petition to revive the action in the name of the executor, was an irregularity. Such notice should have been given, and, on the hearing of the petition, the defendants might have insisted that due proof should be made of the probate of Carson's will and the qualification of the present plaintiff as executor. But this was an irregularity merely, which, like any other irregularity not going to the jurisdiction of the court, may be waived by the opposite party.

The original plaintiff having deceased, it was competent for the court to revive the action in the name of his duly qualified executor. Notice of the petition should have been given; but proceeding without notice affects only jurisdiction of the

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person, not of the subject matter, and a subsequent general appearance waives the defect. The rule is elementary, that a general appearance to the action by the defendant waives a defective service, or want of service, of the original process. The principle of this rule is applicable here.

The argument of the demurrer on behalf of the defendants, without objection to the validity or regularity of the proceedings to revive the action, was clearly a general appearance to the action, and, within the above rule, a waiver of the want of notice of such proceedings.

It may be that the action was revived on insufficient proofs; but there is nothing on the face of the proceedings to show that it was improperly revived. If Carson's will had not been admitted to probate, or if the present plaintiff was not the duly qualified executor of his estate, the defendants should have moved to set aside the revivor proceedings for one or both of those reasons; and, the facts so appearing, the motion should have been granted. No motion to set aside those proceedings was made, and no valid reason for setting them aside is disclosed in the record.

By the Court. — The judgment of the circuit court is affirmed.

MELLOR, by Guardian ad litem, vs. THE TOWN OF UTICA.

February 3 — February 24, 1880.

Highway: Negligence: Evidence.

In an action for an injury alleged to have been caused by defects in a highway over which plaintiff was driving, it was error to permit a witness, who had driven over the highway at the same spot on the same day, and frequently at other times, to answer the question, whether, if a person driving over that part of said road, on that day, had driven in a careful manner, "as you would ordinarily drive on ordinary roads," there would have been any danger of an accident in consequence of the condition of the road; such question calling upon the witness to determine the exact issues which the jury were to determine.

48	457
77	669
48	457
103	590

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APPEAL from the Circuit Court for *Crawford* County.

Plaintiff appealed from a judgment in defendant's favor. The case is stated in the opinion.

For the appellant, there was a brief by *J. T. & Geo. Mills*, and oral argument by *J. T. Mills*.

For the respondent, there was a brief by *Thomas & Fuller*, and oral argument by *Mr. Thomas*.

TAYLOR, J. This action was brought by the plaintiff and appellant to recover damages for injuries received by her in being thrown from a wagon while driving along one of the highways in said town. She alleges that she was so thrown from the wagon by reason of the insufficiency and want of repair of said highway. The defense was, that the highway was not out of repair, and that the injury occurred from the negligence and carelessness of the plaintiff in driving along said highway, and not by reason of any defects in the same.

Upon the trial, the evidence was conflicting as to the exact condition of the highway at the place where the accident happened, and also as to the fact whether the plaintiff was driving carefully at the time of the happening of such accident. The jury found a verdict for the defendant. The plaintiff appeals, and assigns as error that the court improperly permitted one of the witnesses on the part of the defense to answer the following question: "If a person, driving from the West Prairie road down this hill on the 16th of November, 1877, should drive in a careful manner, as you would ordinarily drive on ordinary roads, would there be any danger of an accident in consequence of this road?" The plaintiff objected to the question; the court overruled the objections; plaintiff excepted; and the witness answered: "I should judge it would go safely."

The evidence of this witness showed that he was sheriff of the county, and had driven over this road very often, and on the morning of the 16th of November, 1877, the day the ac-

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cident happened; and that the place mentioned in the question was the same place where the plaintiff claimed the road was out of repair, and where the accident which resulted in her injury happened. He also gave a description of the road at this place, in his evidence.

It is urged that it was error to permit this witness to give his opinion whether a person driving in a careful manner, as he ordinarily drove, along this road, would be in danger of an accident in consequence of the condition of the road at that place. It seems to us very clear that the question should not have been allowed. The question involved all the issues in the case; whether the road was in a reasonable state of repair, and whether the plaintiff was in the exercise of ordinary care in driving over the same at the time the injury occurred. The answer called for was the answer which the jury were required to give as between the parties. The answer said to the jury that the road was in such condition that if the person driving over the same exercised the ordinary care which every person should exercise in driving along such highway, there would have been no accident.

It was calling for the opinion of the witness upon both the material questions in the case. It was the same as though the witness had been asked: "Was the road in a sufficient state of repair?" and, second, "Would the plaintiff have been injured had she exercised ordinary care in driving along such highway?"

The answers to these interrogatories were clearly for the jury, and not for the witnesses. The witnesses are to state the facts which support the issues, and the jury are to draw the conclusions from the facts proven.

That the opinion of the witness upon these questions was clearly inadmissible, is affirmed by this court in the following cases: *Kelley v. Town of Fond du Lac*, 31 Wis., 179-185; *Griffin v. Town of Willow*, 43 Wis., 509; *Benedict v. City of Fond du Lac*, 44 Wis., 495; *Olesen v. Tolford et al.*,

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37 Wis., 327. See, also, *Ryerson v. Abington*, 102 Mass., 531; *Wood v. Railway Co.*, 40 Wis., 582; *Churchill v. Price*, 44 Wis., 542.

The learned counsel for the respondent does not undertake to uphold the ruling of the circuit court in admitting this evidence, upon principle, but argues that it was offered and admitted as a counterbalance to evidence of a similar character which was offered by and received without objection in behalf of the plaintiff on the trial. After a careful examination of the bill of exceptions, we do not find any facts which justify this claim on the part of the respondent; nor are we prepared to hold that, if the claim made by the learned counsel were supported by the record, it would cure the error. We are not aware of any well-established rules by which this court can determine when the errors committed in favor of the one party shall exactly counterbalance those committed in favor of the other, and thereby render all harmless. The admission of the evidence objected to was an error; and, in a case like the one at bar, where the evidence to sustain the issues was conflicting, and where the jury must necessarily weigh the evidence carefully to ascertain on which side it preponderated, we cannot say that such error did not prejudice the plaintiff.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

 BUSHNELL & CLARK VS. JOSEPH ALLEN & BRO.

February 3 — February 24, 1880.

GARNISHMENT: PRACTICE. (1) *Proceedings on failure of garnishee to appear.* (2) *Omission of docket entries by J. P., as to adjournments.* (3-5) *What objections garnishee bound to take in behalf of principal debtor.* (4, 7) *Amendment of defects in garnishment proceedings.* (6) *Record in garnishment.*

1. *It seems that, under the R. S. of 1858, if a garnishee in justice's court failed to appear on the return day of the summons, the justice might*

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afterwards compel his attendance, under sec. 119, ch. 120; or, after judgment against the attachment defendant, might render judgment against the defaulting garnishee for the amount thereof, under sec. 130; or that, before such judgment, the garnishee might appear and answer, under sec. 120.

2. The omission of the justice to make any entry in his docket in the garnishment proceeding, until after the principal judgment was entered, although there had been a previous *adjournment* in both actions, is not fatal to a judgment against the garnishee. So held in a suit against the garnishee (who had paid such judgment), by one who, between the service of the garnishee summons and the return thereof, had taken an assignment of the principal debtor's claim against such garnishee, and had notified him.
3. Even where the summons in garnishment is not served on the principal debtor, as the statute now provides, the garnishee is only required to make such defenses *to the merits* as he knows the principal debtor might make if present defending the garnishment proceedings, and not to make technical objections to defects in the record which may readily be cured by amendment. *Johann v. Rufener*, 32 Wis., 195, and *Pierce v. Railway Co.*, 36 id., 283, distinguished.
4. Where copartners are garnished by their firm name, and the return shows service by reading it and delivering a copy to one of them, but does not show *which one*, and is indorsed upon the garnishee summons, instead of upon the summons in the principal action, these defects may be cured by amendment.
5. Where, in such a case, the garnished firm appeared by one of its members and answered, and the principal debtor also appeared in the garnishment proceeding, the court acquired jurisdiction, and the failure of the garnishees to object to the defects in the return was no breach of duty to such debtor or his assignee.
6. In garnishment under an attachment or summons, the fact that a judgment has been rendered against the principal debtor need not appear by the record in the garnishment proceeding; but the records in that and the principal suit are to be read together.
7. Where the firm of "J. Allen & Bro." consisted of *Joseph* and *John Allen*, and, upon an affidavit that "John Allen & Bros." were indebted, etc., a summons in garnishment, addressed to "John Allen & Bro." was served upon one member of the firm, and the firm appeared and answered by one of its members: *Held*, that the misnomer of the garnishees in the affidavit and summons is of no importance; and an amendment in that respect was properly allowed.

APPEAL from the Circuit Court for *Grant* County.

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One Wells brought his action on contract against one Williams, before Charles E. Stehl, Esq., a justice of the peace. Wells presented to the officer having the summons for service, an affidavit that "*John Allen & Bros.*" were indebted to Williams, and demanded that they be summoned as garnishees.

The officer thereupon issued a garnishee summons, directed "To *John Allen & Bro.*, and John Williams, said defendants," returnable February 15, 1878, at 10 o'clock A. M., at which time the original summons was also returnable. The officer made return, indorsed on the garnishee summons, that on the 7th of February, 1878, he served the same by reading it "to the within named defendant, personally, and giving him a copy thereof." ¹

On the return day the cause was removed, on the affidavit of Williams, to William Fisher, Esq., another justice of the peace.

The docket entries of Justice Fisher show that Williams and the garnishees (these defendants) appeared before him on the same 15th of February, and both the principal action and that against the garnishees were adjourned to the 23d of the same month, at 10 o'clock A. M., at the office of the justice. At the time last mentioned, the action was tried, and Wells recovered judgment against Williams. *Joseph Allen*, also, then appeared and answered, acknowledging an indebtedness by his firm to Williams of \$45.10; and judgment was rendered against the garnishees for that amount in favor of Wells. The defendants afterwards paid such judgment.

On the 14th of the same February, Williams assigned his demand against *J. Allen & Bro.* to the plaintiffs, who on the same day notified that firm of such assignment. This action is brought by the plaintiffs, as such assignees, to recover the amount of such demand.

¹ It seems that the proper name of the firm was "*J. Allen & Bro.*," and that it consisted of *Joseph* and *John Allen*; but which of these brothers was intended by "*J. Allen*" in the firm name, does not appear.—R&P.

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Evidence was introduced tending to prove — perhaps proving — that as late as February 22d, Justice Fisher had made no docket entries whatever in the garnishment proceedings; also, that neither of the garnishees appeared before him on the return day of the summons. The court directed a verdict for the defendants; and plaintiffs appealed from the judgment entered pursuant to the verdict.

For the appellants, there was a brief by *Bushnell, Clark & Watkins*, and oral argument by *Mr. Bushnell*:

1. The garnishment proceedings were against "John Allen & Bro.," and furnish no defense to the firm of *Joseph Allen & Bro.* Nor could the amendment relate back so as to confer jurisdiction not previously obtained in the manner which the statute directs. *Steen v. Norton*, 45 Wis., 412. The return of the officer in that proceeding was upon the garnishee summons, instead of the summons in the principal suit. It was also void for uncertainty. A justice must have proper evidence of service before he can proceed and render a binding judgment. This was insufficient to confer jurisdiction of either person or subject matter. 2 Wait's L. & P., 13; 3 Chand., 183; 45 Wis., 412, and cases there cited. 2. If the justice ever had jurisdiction, he lost it by adjourning the case without making up his docket and entering therein the fact of such continuance. The original and garnishee suits are distinct actions, and must be separately entered in the docket. Tay. Stats., § 125; 4 Chand., 12; *Roberts v. Warren*, 3 Wis., 736; *Crandall v. Bacon*, 20 id., 639; *Brahmstead v. Ward*, 44 id., 591; *Brown v. Kellogg*, 17 id., 475; *Grace v. Mitchell*, 31 id., 535. If a garnishee submit to the jurisdiction when there is none, and pay under it, it will avail nothing. Drake on Attachment, §§ 694, 695. 3. The record is fatally defective in that it does not show that a judgment had been previously rendered against the principal debtor. Drake on Attach., § 658 a, and cases there cited. Payment under such a judgment is purely voluntary, and is no protection to the

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garnishee. Drake, §§ 711-13. 4. The essence of the garnishee's equity consists in the fact that he has done his full duty and has been *compelled* to pay. He should exhaust all legal means to prevent a judgment against him. *Adams v. Filer*, 7 Wis., 323; *Harmon v. Birchard*, 8 Blackf., 419; Wells's Res. Adj., § 163; *Johann v. Rufener*, 32 Wis., 195. The garnishee defendants here were not bound to appear, because their fees were not paid to them. Ch. 361, Laws of 1876; R. S., sec. 3781.

For the respondents, there was a brief by *Barber & Clementson*, and oral argument by *Mr. Clementson*:

1. The affidavit for garnishment was sufficient in form and substance. This conferred jurisdiction of the subject matter. Though the return is made on the wrong summons, and is not clear as to the facts relating to the service, yet the subsequent appearance of the garnishees was a waiver of these defects, and conferred jurisdiction of the person. *Heeron v. Beckwith*, 1 Wis., 17; *Lowe v. Stringham*, 14 Wis., 222; *State v. Doane*, id., 483; *Barnum v. Fitzpatrick*, 11 id., 81; *Blackwood v. Jones*, 27 id., 498; *Baizer v. Lasch*, 28 id., 268; *Ruthe v. Railroad Co.*, 37 id., 346; *Everdell v. Railroad Co.*, 41 id., 395. 2. That the garnishee summons was in fact served upon both of the garnishee defendants, was shown by their undisputed testimony. They were bound from the time of service, not from the time when the officer should make a proper return. The return could be amended at any time, according to the facts. *Moyer v. Cook*, 12 Wis., 335; *Northrup v. Shepard*, 23 Wis., 513; *Bacon v. Bassett*, 19 id., 47; *Bank v. Taylor*, 16 id., 609; *Robertson v. Kinkhead*, 26 id., 560. 3. The justice did not lose jurisdiction by his failure to enter the adjournment in his docket. The proceeding in garnishment is ancillary, and if the main suit is regularly entered and jurisdiction therein maintained, that is sufficient. While the main suit is pending, the garnishment suit is always open; and if the garnishee has failed to appear on return

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day, he may afterward appear and answer at any time before final judgment against him. R. S., sec. 3729. The appellants took their assignment after service of the summons in garnishment, and stand in the same position as the principal debtor. They could not prevent the officer from amending his return in accordance with the facts, nor the garnishees from appearing, and so dispensing with such amendment. 4. The position that because the garnishees appeared without payment of their fees, the judgment is no protection, is not sustained by the authorities cited. The provision of the statute relative to payment of fees was for the benefit of the garnishee, and places him upon the same footing as a witness, and may be waived by him. There is no evidence that the garnishees knew of the defective return, or of the failure by the justice to enter the adjournment in his docket. They appeared, and paid the judgment, in good faith, and are entitled to protection.

LYON, J.. It is obvious from the foregoing statement of the case, that if the judgment rendered against the defendants in the garnishment proceedings is valid, it is a perfect protection to the defendants, and there can be no recovery in this action. Otherwise, the plaintiffs may recover. We are to determine, therefore, whether any of the objections urged against the validity of that judgment are well taken. For the purposes of the case, it is assumed that Justice Fisher made no entry in his docket of the garnishment proceedings before February 23d — the date of the judgment.

1. Is the failure of the justice to enter those proceedings in his docket, and particularly to enter the adjournment from the 15th to the 23d of February, fatal to the judgment against the garnishees?

Such omission in the principal action would doubtless be fatal to a judgment therein. But we do not think this strict rule is applicable to a garnishment proceeding, which is ancil-

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lary to the principal action and dependent upon it. This seems apparent from the provision of the statute which allows a garnishee who has failed to appear at the proper time, to appear and answer *at any time* before final judgment against him, on payment of costs. R. S. 1858, ch. 120, sec. 120. If *Allen & Bro.* did not appear before Justice Fisher on the return day of the garnishee summons, this statute gave them the right to appear and answer at any time before final judgment against them, on complying with the prescribed terms; and that right does not seem to be affected by the failure of the justice to make proper entries in his docket. The better opinion seems to be, that, if the garnishee defendant fails to appear on the return day of the summons, the proceeding stands open, and the justice may afterwards compel his attendance, under section 119, ch. 120; or, after judgment against the defendant in the attachment suit, may render judgment against the defaulting garnishee for the amount thereof, under section 130; or, before such judgment is rendered, the garnishee may appear and answer under section 120.

2. The return of the officer, of service of the garnishee summons, is defective in that it does not show upon which of the defendants he served it. But it was proved on the trial that the summons was duly served on one of the *Allen Brothers*, and that the parties to the principal action were present at the examination of the garnishees on the 23d of February. Furthermore, the return was indorsed upon the garnishee summons, and not upon the original summons, as required by statute.

It is claimed that it was the duty of the garnishees to make objection to the proceedings because of these irregularities or defects in the proceedings. Had such objection been made, doubtless it would have been unavailing; for the justice would have allowed the officer to make a correct return by indorsing on the original summons a certificate of due service of the garnishee summons on one of the firm of *Allen & Bro.*

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It was said in *Johann v. Rufener, Garnishee*, 32 Wis., 195, that it is the duty of the garnishee to exhaust all legal means to avoid a judgment against him; and in *Pierce v. Railway Co.*, 36 Wis., 283, where the fund sought to be reached by the garnishment proceedings was exempt from execution, Mr. Justice COLE says that the garnishee should have claimed the benefit of the exemption for the original debtor, "or at least have given him notice of the pendency of these proceedings, and afforded him an opportunity to defend." These observations were made with reference to the former law, which did not require the garnishee summons to be served on the defendant in the main action.

Whether the garnishee summons was or was not served upon Williams, the original defendant, we think all that is required by the rule above stated is, that the garnishee shall interpose any defense to the merits which he knows the principal defendant might interpose were he present defending against the garnishment proceedings. We do not think he is required to make technical objections to defects in the record, which, if made, can readily be cured by amendment. We have seen that the defects in the officer's return might have been so cured.

The garnishee summons having been duly served on one of the firm of *Allen & Bro.*, and that firm having appeared by one of its members on the 23d of February, and answered, and Williams, under whom the plaintiffs claim, also having appeared at the same time, our opinion is that the court had jurisdiction to render judgment against the garnishees, and that the failure of the garnishees to object to the defects in the return was no breach of their duty to Williams or his assignees, the present plaintiffs.

3. It is further maintained by the plaintiffs that the garnishee judgment is fatally defective because the record in that proceeding fails to show that a judgment had been previously rendered against Williams. The point is not well taken, and

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the authority cited (Drake on Attachments, § 658 *a*) does not sustain it in cases like this. The true rule is, that, in a garnishment proceeding under an attachment or summons, the record in such proceeding and in the principal suit are to be read together; and it is sufficient if the whole record shows that a judgment has been rendered against the principal defendant. The rule contended for is only applicable where a statute gives a garnishment proceeding upon a judgment, without execution. It is obvious that, in such a case, the record in the proceeding should show the judgment upon which it is based.

4. The defendants constituted the firm of "*J. Allen & Bro.*" That firm was summoned as garnishees, and appeared and answered. The misnomer of the firm in the inception of the proceedings is of no importance. Besides, such misnomer was properly cured by amendment.

It follows that the judgment against these defendants in the garnishment proceedings is a complete defense to the plaintiffs' claim in this action, and that the circuit court properly directed a verdict for the defendants.

By the Court.—Judgment affirmed.

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February 3 — February 24, 1880.

48	468
111	1875
48	468
116	57

PROMISSORY NOTES: EVIDENCE: SURETYSHIP: ESTOPPEL. (1) *Proof that apparent joint maker was merely surety.* (2) *Usurious agreements for extension and payments thereon, no release of surety.* (3) *Estoppel in pais.*

1. One who appears upon the face of a note to have signed it as a joint maker, may show by parol that the creditor knew, when the note was executed, that he was merely a surety, and has since, without his consent, extended time of payment to the principal.
2. Successive agreements by the payee of a note to extend time of payment to the principal for a usurious consideration, with successive payments,

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after the expiration of each time of extension, of the usury stipulated therefor, do not release the surety; there being no suspension of the payee's right to enforce payment of the note.

3. Where, upon the principal maker of a note compromising with a part of his creditors, including the surety, the latter treats the amount of the note as an existing obligation of the principal to him, he is estopped to deny his liability to the payee thereon, though the latter was not a party to the compromise.

APPEAL from the Circuit Court for *La Fayette* County.

This action was brought against Thomas H. Maynard, J. Lester Adams and *W. Thompson Adams*, on a promissory note executed by them in the following form: "APPLE RIVER, ILL., MAY 5, 1870. Twelve months after date we promise to pay to the order of *Samuel Irvine*, five hundred dollars, at ten per cent. per annum, value received.

"MAYNARD & ADAMS.

"W. T. ADAMS."

Only the defendant *W. Thompson Adams* answered; and his defense was that, at the request of the plaintiff and of his codefendants, he executed the note merely as a surety, and that plaintiff, on several different occasions, and in each case for a valuable consideration, had extended the time of payment of the note without his consent.

The issue was tried by the court without a jury, and the facts found were substantially as follows: 1. At the date of said note, Thomas H. Maynard and J. Lester Adams were copartners in trade doing business in Apple River, Ill., under the firm name of Maynard & Adams; the note was given by said firm in that state for money loaned by plaintiff to the firm; and *W. T. Adams* signed it merely as surety for the firm, as plaintiff well knew. 2. About the time the note matured, plaintiff entered into a contract with Maynard and J. Lester Adams, by the terms of which plaintiff agreed to extend the time of payment of the note one year, in consideration of which Maynard & Adams agreed to pay him \$25 in addition to the interest stipulated by the terms of the note; and some time after

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the expiration of the extended period they paid in fact one-half of said additional sum, plaintiff releasing them from payment of the other half. The note was further extended from year to year by agreement between plaintiff and said firm, the latter paying for such extension each year \$12.50, "the sum agreed to be received therefor by the plaintiff," until the failure of the firm in 1875. *W. T. Adams* had no knowledge of such extensions until such failure. 3. In 1875, Maynard & Adams compromised with their creditors, paying them forty per cent. of their liabilities. "The note in suit was put in as a liability at such compromise, *W. T. Adams* consenting thereto; the firm paid forty per cent. of their liability upon the note; but neither the plaintiff nor *W. T. Adams* received any part of such payment or sum of money. The sum was taken by the defendant J. Lester Adams, he undertaking to pay the same to the plaintiff, but never doing it."

Upon these facts the court held that *W. T. Adams* was released from liability upon the note; and judgment was accordingly rendered in favor of said defendant, from which the plaintiff appealed.

Henry S. Magoon, for appellant:

It is the settled general rule, that parol evidence will not be admitted to add to, contradict or vary the terms of a written instrument. 1 Phillips Ev., 637, 665, 668; 1 Greenl. Ev., § 275; *Foster v. Clifford*, 44 Wis., 571; *Charles v. Denis*, 42 id., 56; *Strachan v. Muxlow*, 24 id., 26; 12 Wend., 573; 1 Cow., 249; 1 Hill, 116; 1 Denio, 400; 16 Wall., 566; 91 U. S., 291; 2 Parsons on Notes, 501; 42 Ill., 165; 9 Gray, 337; 7 Bosw., 366; 45 Barb., 214; and many other cases. The case at bar is within the rule. *Yates v. Donaldson*, 5 Md., 389; *Kritzer v. Mills*, 9 Cal., 21; *Bull v. Allen*, 19 Conn., 101; *Manley v. Boycot*, 2 Ell. & Bl., 46; *Strong v. Foster*, 17 C. B., 201; *Hollier v. Eyre*, 9 Clark & Fin., 45; *Price v. Edmunds*, 10 Barn. & Cress., 578; *Perfect v. Musgrove*, 6 Price, 111; *Farrington v. Galloway*, 10 Ohio, 543; *Slipher v. Fisher*, 11 id.,

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299; *Sprigg v. Bank of Mt. Pleasant*, 10 Pet., 265; 14 id., 206; 8 Wheat., 211; 1 Johns. Ch., 429; 6 Vesey, 328 and note; *Bank v. Dunn*, 6 Pet., 56; *Brown v. Wiley*, 20 How. (U. S.), 447; *Rockmore v. Davenport*, 14 Tex., 602; *Thompson v. Ketcham*, 8 Johns., 190. Though in fact a surety, respondent signed as principal maker, and is estopped to deny his liability as such. *Carver v. Jackson*, 4 Pet., 83; 1 Scam., 148; 21 Ill., 584; 1 Greenl. Ev., §§ 23-26; *Hunter v. Bryden*, 21 Ill., 591; *Daggett v. Gage*, 41 id., 465; *Casey v. Brabason*, 10 Abb. Pr., 368. 2. Mere delay, remissness or indefinite extensions by the creditor will not operate to release a surety; but, to have that effect, there must be a sufficient consideration and a time definitely fixed. *Harris v. Newell*, 42 Wis., 687; *Bellows v. Lovell*, 5 Pick., 310; *Frye v. Barker*, 4 id., 382; *Taylor v. Beck*, 13 Ill., 384; *Gardner v. Watson*, id., 347; *Flynn v. Mudd*, 27 id., 325; 34 id., 424; 2 Barr, 286; 12 Sm. & M., 535; 4 Leigh, 622. The only agreement for an extension pretended or testified to in this case, was founded upon a usurious consideration. An illegal contract for an extension will not release the surety. *Meiswinkle v. Jung*, 30 Wis., 362; *Vilas v. Jones*, 1 N. Y., 286; *Galbraith v. Fullerton*, 53 Ill., 126; 35 id., 40; 32 id., 22; 75 id., 215; 78 id., 446; 31 id., 400. 3. By the written composition in 1875, respondent waived the merely technical and inequitable defense of discharge by extension. *Joliffe v. Madison Ins. Co.*, 39 Wis., 111; *Allen v. Harrah*, 30 Iowa, 363. No consideration is necessary to support a waiver, nor will ignorance of his legal rights nullify the waiver. An indorser of a note who takes an assignment of the maker's estate, thereby waives demand and notice, and must pay. *Cheshire v. Taylor*, 29 Iowa, 492; 15 id., 447; 6 id., 191; *Mechanics' Bank v. Griswold*, 7 Wend., 165; 34 Me., 227; 5 Conn., 175; 3 Denio, 16; 5 Mass., 170; *Hinds v. Ingham*, 31 Ill., 403. By putting the note in the compromise agreement, respondent prevented appellant from doing the same thing, and thereby

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directly and injuriously affected the rights of the latter. He is therefore estopped from denying his liability, whether he received the percentage or not. *Snyder v. Van Doren*, 46 Wis., 602; *Hale v. Danforth*, id., 554; *Hefner v. Vandolah*, 57 Ill., 520; *Givens v. Bank*, 85 id., 442.

For the respondent, there was a brief by *Orton & Osborn*, and oral argument by *Mr. Orton*:

1. Parol evidence is admissible to prove that a joint maker of a note is in fact a mere surety. But for the suggestion of the chief justice in *Harris v. Newell*, 42 Wis., 689, it would seem that this question was settled in this state by *Riley v. Gregg*, 16 Wis., 671. Independent of authority, however, and as an original proposition, the evidence is clearly admissible. The fact sought to be proved is not to contradict the written contract, but is outside of and collateral to it. The great weight of authority, also, is in favor of its admission. *Brandt on Suretyship*, 22; id., § 17, and cases there cited; *Edwards on Bills*, 573; *Pooley v. Harradine*, 7 Ell. & Bl., 431; *Greenough v. McClelland*, 105 E. C. L., 428; *Perley v. Loney*, 17 Up. Can. Q. B., 279; *Hubbard v. Gurney*, 64 N. Y., 457; *Barry v. Ransom*, 12 id., 462; *Easterly v. Barber*, 66 id., 433; *Sayles v. Sims*, 73 id., 551; *Colgrove v. Tallman*, 67 id., 95; *Carpenter v. King*, 9 Met., 511; *Harris v. Brooks*, 21 Pick., 195; *Davis v. Burrington*, 30 N. H., 517; *Grafton Bank v. Kent*, 4 id., 221; *Wheat v. Kendall*, 6 id., 504; *Smith v. Sheldon*, 35 Mich., 42; *Gates v. Hughes*, 44 Wis., 332; *Bank of Steubenville v. Hoge*, 6 Ohio, 17; *Flynn, Ex'r, v. Mudd*, 27 Ill., 323; *Drew v. Drury*, 31 id., 250; *Kennedy v. Evans*, 31 id., 258; *Fowler v. Alexander*, 1 Heisk. (Tenn.), 425; *Mechanics' Bank v. Wright*, 53 Mo., 153; *Coats v. Swindle*, 55 id., 31; *Lime Rock Bank v. Mallett*, 34 Me., 547; *Piper v. Newcomer*, 25 Iowa, 221; *Kelly v. Gillespie*, 12 id., 55; *Bank of St. Albans v. Smith*, 30 Vt., 148; *Stewart v. Parker*, 55 Ga., 659; *Fraser v. McConnell*, 23 id., 368; *Branch Bank v. James*, 9 Ala., 949. 2. The

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surety was discharged by appellant's extension of time to the principal without his consent. That the contract for such extension was usurious will not change the rule. Neither by the statutes of Wisconsin nor by those of Illinois is a usurious contract void. On the contrary, both distinctly affirm the validity of such contracts by allowing the recovery of the principal; merely imposing a penalty upon the lender for "accepting or receiving" illegal interest. It is important to note that the parties are not *in pari delicto*. It is oppression on one side and submission on the other. And though the borrower may set up usury for the purpose of avoiding a contract tainted with it, the lender cannot. This doctrine was announced in this state in the early case of *Riley v. Gregg*, 16 Wis., 672; and confirmed in *Austin v. Burgess*, 36 id., 192. *Vilas v. Jones*, 1 N. Y., 274, which has been regarded as holding a different rule, is expressly overruled by *Billington v. Wagoner*, 33 N. Y., 31, and *La Farge v. Herter*, 9 id., 243. *Meiswinkle v. Jung*, 30 Wis., 362, relied upon by appellant, seems to be in conflict with the other cases referred to; and in a note by C. J. Dixon to *Riley v. Gregg*, in the new edition of the reports, it appears that that case was overlooked in the latter decision; so that the question must be still regarded as an open one. Moreover *Meiswinkle v. Jung* was based upon the overruled case of *Vilas v. Jones*. Again, the contract in this case is an executed one. That a usurious contract of extension fully executed will release the surety, is held by a great number of authorities. *Danforth v. Semple*, 73 Ill., 170; *Myers v. First National Bank*, 78 id., 257; *Turrill v. Boynton*, 23 Vt., 142; *Scott v. Harris*, 76 N. C., 205; *Redman v. Deputy*, 26 Ind., 338; *Calvin v. Wiggam*, 27 id., 489; *Cross v. Wood*, 30 id., 378; *Grafton Bank v. Woodward*, 5 N. H., 99; *Austin v. Darwin*, 21 Vt., 38; *White v. Whitney*, 51 Ind., 124; *Scott v. Saffold*, 37 Ga., 384; *Corielle v. Allen*, 13 Iowa, 289; *Kelly v. Gillespie*, 12 id., 55.

COLE, J. On the face of the note, the defendant *W. Thomp-*

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son Adams appears to be a joint maker. But parol testimony was offered on the part of the defense, and received against the plaintiff's objection, to show that he really signed the note as surety. The first error assigned here for a reversal of the judgment, is the admission of this testimony. It is insisted by the learned counsel for the plaintiff, that, to permit a party who appears to have signed a note as principal, to show by parol that he signed as surety, is a violation of the well settled rule of evidence, that a written contract cannot be contradicted or varied by parol testimony. But where the creditor knows, when the note is executed, that a party signs as surety, then, as we understand, the great weight of authority admits parol testimony to show that fact. It was so decided by this court in *Riley v. Gregg*, 16 Wis., 676, where the question was directly presented. DIXON, C. J., in that case, says that the admission of such testimony does not vary the effect of the undertaking, but is admissible to show that the creditor, who knows the real relation of the contracting parties, violates his faith impliedly given to the surety, not to interfere with those relations so as to impair his legal rights or diminish his remedies, when he extends the time of payment to the principal. It is not necessary that it should appear from the contract itself that one signed as surety and not as principal. Suretyship, being a collateral fact, may be shown by evidence *aliunde*. *Carpenter v. King*, 9 Met., 511.

To the same effect is the recent decision of the court of appeals of New York in *Hubbard v. Gurney*, 64 N. Y., 457. In this case CHURCH, C. J., examines the question at great length upon the authorities, and states, in substance, in the words of the head note, that "such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any

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security or omitting to enforce the contract when requested." It is true, in *Harris v. Newell*, 42 Wis., 687, the chief justice stated that the court entertained a very grave doubt whether one who appeared to have executed a promissory note as principal could show by parol that he signed it as surety; but this intimation was thrown out rather to invite further discussion of the question than with the purpose of shaking or overthrowing the decision in *Riley v. Gregg*. The intimation has answered its purpose, and we are all now fully satisfied that the latter case lays down the true rule upon the subject, and is in strict accord with the weight of modern authority. It is deemed unnecessary, therefore, further to consider the question.

In this case it was claimed that *W. Thompson Adams* was discharged by an extension of time of payment given the firm of Maynard & Adams, who were the principal debtors; and the learned circuit judge so decided. We think, however, that the findings of fact fail to show that the surety was discharged by a valid agreement to extend the time of payment of the note. In the second finding the circuit court in effect finds that, about the time the note matured, in May, 1871, the plaintiff and the defendants Maynard & Adams made a contract, by the terms of which the plaintiff agreed to extend the time of payment of the note for one year, in consideration of being paid for such extension the further sum of five per cent., in addition to the ten per cent. interest which the note drew; that sometime after the termination of such extended period the firm paid \$12.50 of the sum agreed to be paid for the extension, the plaintiff releasing them from the payment of the remaining \$12.50 of the consideration for the extension; also, that the payment of the note was further extended from year to year by like agreement, the firm paying for such extension each year the sum of \$12.50, the amount agreed to be received therefor by the plaintiff, until the failure of the firm in 1875; and that the surety had no knowledge of these various extensions.

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Now, according to our understanding of this finding, it shows an executory usurious agreement to extend the time of payment, which, under the decisions of this court, does not constitute a "basis or consideration upon or out of which any binding promise for that purpose could arise or be created." *Riley v. Gregg, supra; Meiswinkle v. Jung*, 30 Wis., 361; *St. Maries v. Polleys*, 47 Wis., 67. It is plain that each agreement to extend the time of payment was executory in its character, and was therefore void. The plaintiff did not place it out of his power at any time to enforce a collection of the note by action. Under such circumstances the surety was not released. But, if there were any doubt upon this point, the facts stated in the third finding show that *W. Thompson Adams* is estopped from insisting upon the defense. That finding is, that the firm of Maynard & Adams compromised with their creditors in 1875, paying forty per cent. of their claims; that this note was put in as a liability of the firm on such compromise, by *W. Thompson Adams*, or with his consent; that the firm paid forty per cent. of the note, but neither the plaintiff, who was not a party to the compromise, nor the defendant *W. T. Adams*, received any part of such payment, the sum being taken by J. L. Adams, upon a promise to pay the same to the plaintiff, which he never did. Now, if *W. T. Adams* treated this note at this time as an existing liability to him, and caused it to be included in the compromise, he should be estopped from saying he was not bound to pay the note in consequence of the extension. There could be no doubt of the correctness of this view, if *W. T. Adams* had actually received the forty per cent. upon it. But, that he did not receive it was owing to his own laches or default. He could have demanded it of the firm, and had the full benefit of the composition. It is true, *W. T. Adams* denies that this note was included in the claim which he presented against the firm on the compromise, and his testimony in that respect is corroborated by that of his brother, J. L. Adams. On the

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other hand, Maynard testified that it was so included. We shall not stop to discuss the testimony as to whether it was or not, but accept the finding of the court as correct; for certainly there is no such clear preponderance of testimony against the second and third findings of the circuit court as would warrant us in disregarding them.

The issue on the affidavit of the plaintiff for a writ of attachment was tried with the main issue, and fell with it.

It follows, from the views which we have taken of the case, that the judgment of the circuit court upon both issues must be reversed, and the cause be remanded to give judgment for the plaintiff upon them.

By the Court. — So ordered.

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February 4 — February 24, 1880.

APPEAL TO SUPREME COURT: (1) *From judgment on striking out demurrer to complaint as frivolous.* (6) *When taxation of costs not reviewable here.*

VENDOR AND PURCHASER OF LAND. (2, 3) *When vendor's want of title no defense to action for installment of price, or to foreclose contract of sale.* (4) *When statutory remedy against tenant in default will not lie against purchaser in possession.* (5) WRIT OF ASSISTANCE upon foreclosure of land contract.

1. A demurrer to the complaint having been stricken out as frivolous, with leave to answer within a limited time on terms (R. S., sec. 2681), and judgment having been rendered after the lapse of the time limited, in default of an answer: *Held*, that the question on appeal is, whether the demurrer was *well taken*; and where the demurrer is in effect a *general* one, the question is, whether the complaint states a good cause of action.
2. The mere fact that the vendor of land by executory contract (containing a representation or warranty that he has the title) has not acquired the legal title when an intermediate installment of the purchase money becomes payable by his vendee, is no defense to his action for such installment, where by the contract the deed is not to be made until payment of the last installment, which will not become due for a considerable length of time.

48	477
78	550

48	477
80	317

48	477
108	173

48	477
e116	*604
f116	*605

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- [3. In an action for strict foreclosure of ~~such a~~ contract, even for non-payment of the *last* installment of the purchase money, ~~where~~ defendant is in possession of the premises, the fact that plaintiff has not the title ~~is no~~ defense, unless defendant has offered to rescind the contract and surrender the possession. *McIndoe v. Morman*, 26 Wis., 588.]
4. An executory contract of sale of land provided that the vendee should go into possession, make certain improvements and pay certain taxes, and "hold as a tenant at sufferance, and liable to be expelled as a tenant holding over," on failure to make any payment as specified; and the vendee went into possession, and made default after some payments. *Held*, that the statutory proceeding for a recovery of possession by a landlord against a tenant in default, would not lie.
5. A judgment of strict foreclosure of a land contract may provide that after the time thereby limited for payment, a writ of assistance shall issue if defendant refuse to surrender; that remedy being within the inherent power of chancery.
6. Objections to the taxation of costs in the court below, not made to that court, cannot be considered here.

APPEAL from the Circuit Court for *Grant* County.

Action for the strict foreclosure of a land contract. Defendant appealed from a judgment in plaintiff's favor. The case is stated in the opinion.

For the appellant, there was a brief by *Bushnell & Clark*, and oral argument by *Mr. Bushnell*:

1. The judgment should be reversed unless the demurrer was frivolous. This is the rule where a defense interposed by answer is stricken out as frivolous; and up to the case of *Cobb v. Harrison*, 20 Wis., 625, the same was held in case of a demurrer. *Clapp v. Preston*, 15 Wis., 543; *Cahoon v. Wisconsin Cent. R. R. Co.*, 10 id., 290, and cases cited. Why the rule which obtains in one case should not apply also to the other, is difficult to conceive. But whatever the decisions heretofore, it would seem that under the present revised statutes the question of frivolousness might be raised. Sec. 3070 provides that the court on appeal may, without exception taken, review *any alleged error* appearing on the record. If, therefore, there was error in holding the demurrer frivolous, it must be subject to review. 2. If a demurrer admits of argu-

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ment, it is not frivolous. *Cottrill v. Cramer*, 40 Wis., 559. The ground of demurrer here is, that the complaint does not state a cause of action. Appellant insists that the demurrer is well taken. A vendor of land by his contract impliedly represents that he has and will convey a good title. Equity will not enforce specific performance in his favor, unless he is himself in a position to perform on his part. The plaintiff in this suit has only an equitable title, and that in default. He may be insolvent; and from his nonpayment insolvency is to be presumed. Can he require defendant to pay this and subsequent installments on the contract, and run the risk of his applying the money in such a way as to secure the title? Actions for relief of this kind are not matter of right, but rest in the discretion of the court. It is insisted that before this action will lie, plaintiff should show himself possessed of a good title. *Burwell v. Jackson*, 9 N. Y., 535; Rawle on Covenants for Title, §§ 562-5,611-12, 714; 1 Story's Eq. Jur., § 161; 2 id., §§ 693, 716, n. (1), 723, 742-9, 751, 760, 771, 776-7, 790; 3 Parsons on Con., 350, 407, 409, note (t), 414; 2 Sug. on Vend., 419; *Seaton v. Slade*, 2 L. C. in Eq., 365; *Romilly v. James*, 6 Taunt., 263. 3. The contract clearly undertakes to raise the relation of landlord and tenant between the parties. *Wright v. Roberts*, 22 Wis., 161; *Brugman v. Noyes*, 6 Wis., 10. This being the case, the plaintiff has a full and complete remedy at law, and equity will not interpose. *Shephard v. Genung*, 5 Wis., 398; *Prescott v. Everts*, 4 id., 314; *Danaher v. Prentiss*, 22 id., 317. 4. There are several errors in the form of the judgment. The costs of the motion to strike out the demurrer are improperly included in it. A clause awarding to plaintiff a writ of assistance to aid in enforcing it is also improperly inserted. The law provides the means of enforcing judgments, and the court has no authority to assume legislative functions by providing other means. R. S., §§ 2966, 2967 and 2969; Freeman on Judgm., § 3, and cases there cited. Again, the defendant is entitled to have a

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certified copy of the judgment served upon him before being visited with the penalties of disobedience. The judgment decrees that he must be satisfied with merely having a certified copy *shown* him. It further provides that the writ may issue on application to either the court or the clerk; if permissible at all, it should issue only on order of the court. *Landon v. Burke*, 36 Wis., 382.

For the respondent, there was a brief by *Barber & Clementson*, and oral argument by *Mr. Clementson*:

1. The demurrer was frivolous within the rule of *F. & M. Bank v. Sawyer*, 7 Wis., 383, because without argument or research the court could determine its character. But if this court should consider it not frivolous, but bad, the judgment will not be disturbed. *Cobb v. Harrison*, 20 Wis., 625; *Sage v. McLean*, 37 id., 359; *Decker v. Trilling*, 24 id., 610; *Sentinel Co. v. Thomson*, 38 id., 489. 2. Even if the vendor could not give good title, the defendant could not, without an offer to rescind, retain possession of the land and refuse to pay the purchase money. *McIndoe v. Morman*, 26 Wis., 588; *Taft v. Kessel*, 16 id., 273; *Miller v. Larson*, 17 id., 624. By the terms of the contract, the deed was not to be executed until full payment of the purchase money, the last installment of which would not be due until 1885. It would be a full compliance with the contract on plaintiff's part, if by that time he had the title, or procured a conveyance to defendant from the party who had it. *Bateman v. Johnson*, 10 Wis., 1; *Akerly v. Vilas*, 15 id., 401. The tender of a deed, or ability to convey the title, was not, by the contract, a condition precedent to payment of the annual installments; and defendant cannot demand performance of plaintiff until he himself has done what he agreed to do before making such demand. *Gale v. Best*, 20 Wis., 44; 2 Parsons on Con., 679, 529, note (r). 3. The judgment is not open to the objection taken in *Landon v. Burke*, 36 Wis., 378, but was carefully framed to conform to the requirements

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of that and other decisions of the court, and to the rules. *Attorney General v. Lum*, 2 Wis., 507; *Goit v. Dickerman*, 20 id., 630; *Loomis v. Wheeler*, 21 id., 271; Rule VIII, p. 2024, Tay. Stats.

OERTON, J. This is a suit in equity for the strict foreclosure of a land contract. The complaint sets out, substantially, that the eighty acres of land in question was a part of a tract of land purchased and held by the plaintiff, by land contract, from one Putnam David, for the sum of \$4,587.20; of which sum \$2,000 was paid down, and the balance was to be paid thereafter in installments, with interest; that such installments and interest had been partly paid, leaving only the sum of \$1,500 of principal and \$100 of interest unpaid; and that, upon the payment of the same, which the plaintiff is able to make at any time, he can obtain a deed of the whole tract from the said David. The complaint then sets out a land contract between the parties to this action, providing, in substance, for the purchase of eighty acres of said tract, by the defendant from the plaintiff, for the sum of \$1,000, to be paid in yearly installments of \$100 each, with ten per cent. interest on the whole, payable annually; that the first installment of principal and the first year's interest were to be paid on or before the first day of January, 1878; that the defendant should go into possession of the premises, make certain improvements and pay certain taxes thereon, and hold as a tenant at sufferance, and liable to be expelled as a tenant holding over, on failure to make any of the payments at the time specified; and that in case of his failure to make any of the payments the agreement was to be void. The complaint further shows that the defendant went into possession of the premises, and has failed to pay such first installment of principal, and such interest and taxes; and prays that he be adjudged to pay the same in a certain time, to be fixed by the court, and in default

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thereof be forever barred and foreclosed of his right, title and interest in the premises.

To this complaint the defendant interposed what may be called a general demurrer, which was stricken out on motion of the plaintiff, on the ground of frivolousness, and leave given to the defendant to answer in twenty days. No answer having been made, judgment was rendered for the plaintiff, that the defendant pay within one year the sum so found due, together with interest and costs, and that in default of such payment he be foreclosed and dispossessed, and that a writ of assistance issue if he refuses to surrender such possession.

The defendant appeals from this final judgment. The learned counsel of the appellant insists that the question on this appeal is the frivolousness of the demurrer, the order striking out the same on that ground being an interlocutory one, which may be reviewed upon appeal from the final judgment.

The practice of this court may be considered established, that in such a case the question is, whether the demurrer was well taken, or whether the complaint stated a good cause of action. *Cobb v. Harrison*, 20 Wis., 626; *The Sentinel Company v. Thomson*, 38 Wis., 489. Since by the present statute (section 2681, R. S.), in case of striking out a demurrer as frivolous, the court may allow the defendant to plead over within a limited time, on terms, when such an order is made, there can be no substantial distinction between striking out a demurrer as frivolous, and overruling it on argument; for the legal consequences are the same. The objections to the complaint urged here on the argument are —

First. That it shows on its face that the respondent, by his written contract of sale, falsely represented or warranted that he held a valid title to the land he so contracted to sell. This principle may be correct so far as it affects the payment of any part of the purchase money, when the time fixed for such payment is contemporaneous with the time fixed for the execution of the deed, so that the covenants to make payment

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and to execute the deed are mutual and dependent, as in the leading case cited, of *Burwell v. Jackson*, 9 N. Y., 535. But even in such case the principle is to be applied only as *defense* to the payment, founded on such inability to convey a valid title, and other equitable grounds of relief, such as the insolvency of the party contracting and unable to convey, and the impossibility of obtaining the title from other sources without further payment or cost. We have been referred to no authority, and we can find none, that allows such a principle to operate as a defense to the payment of a mere intermediate installment of the purchase money, which falls due long before the time fixed in the contract for the execution of the conveyance, and when the deed is not to be made until the payment of the last installment, which is not yet due.

Second. That the complaint shows the title to the land out of the respondent, and therefore his inability to convey, and so in itself discloses such a failure of consideration or violation of obligation as to be a sufficient defense to the action. It would, perhaps, be a sufficient answer to this objection, that the complaint, although showing title out of the respondent at the present time, *does* show his ability to obtain it at any time, and especially when, by the terms of the contract, he is bound to convey it to the appellant. But, by decisions of this court, without going abroad for adjudications on the question, when we have them so near at hand and at home, and which must express the law of this state at least until overruled by like authority, the principle here contended for is not allowed to obtain, even as matter in defense, in cases where suit is brought to foreclose contracts on failure to pay the last installment, the payment of which could not be enforced without the tender of a conveyance, and the purchaser still retains the possession of the premises.

In *Bateman v. Johnson et al.*, 10 Wis., 1, where the suit was brought by the purchaser for a forfeiture of the contract and the repayment of the purchase money, on the ground that the

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vendor had no title and could not execute, and had not himself executed, a conveyance, but had *procured* a deed to be made to the plaintiff, conveying a good title, by a third person, and tendered the same to the plaintiff before suit, but after the time fixed in the contract, it was held that the tender of such deed was a good defense to the action; and Mr. Justice COLE, in his opinion, uses the following language: "By the contract, the appellant was entitled to a deed conveying to him the entire estate. If the respondents *were not seized* of such an estate, it was their duty to procure a conveyance from the party who was so seized." In this case, it may be said that, although the respondent has not yet obtained the title, the presumption is that he will either obtain such title, and make the proper conveyance of it to the appellant, or procure a conveyance of it from another, when, by the terms of the contract, he is bound so to do, and which time has not yet arrived.

In *Akerly v. Vilas et al.*, 15 Wis., 402, Chief Justice DIXON says in his opinion: "Upon a bill to rescind such agreement, on the ground that the vendor *is unable to give a good title*, if it appear at the time of the decree that he is able to do so, the plaintiff will be compelled to accept."

In *McIndoe v. Morman*, 26 Wis., 588, the defendant had paid part of the purchase money, and had gone into and still held possession of the land, and the time for the payment of the balance of the purchase money and for the execution of the deed was fixed in the contract as the same. The plaintiff brought suit, as in this case, for forfeiture and foreclosure, on the ground of the nonpayment of the balance of the purchase money. The defense was, the inability of the plaintiff to convey a good title, and his insolvency. Even in such a case, much stronger than this for the equitable operation of the principle contended for, it was held that such a defense was not available unless the defendant first offered to rescind the contract and surrender up his possession. This decision is so directly in point that further references are unnecessary.

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Third. The objection that the respondent had an ample remedy at law, and the right to proceed against the appellant as a tenant holding over under the clauses of the contract making him a tenant at sufferance, is equally untenable. The complaint itself shows that the appellant had rights and equities under his contract of purchase which would defeat an action at law against him as a mere tenant at sufferance; and such an action would not lie in such a case where the appellant is in possession as purchaser, having paid part of the purchase money. *Plato v. Roe*, 14 Wis., 453; *Ott v. Rape et al.*, 24 Wis., 336; *Ragan et al. v. Simpson et al.*, 27 Wis., 355; *Nightingale v. Barens*, 47 Wis., 389.

Fourth. That part of the judgment allowing a writ of assistance to oust the appellant from the possession of the premises, on his refusal to surrender the same to the respondent, is clearly proper, and within the inherent power of a court of chancery. Jacob's Law Dic., title, "WRIT OF ASSISTANCE."

Fifth. The objection to improper costs taxed was not made in the court below, nor was any exception taken or motion for retaxation made; and it cannot therefore be considered here.

By the Court.—The judgment of the circuit court is affirmed, with costs.

DINGMAN VS. THE STATE.

February 4—February 24, 1880.

(1) CONTINUANCE. (2) NEW TRIAL, for newly discovered evidence. (3) INSTRUCTIONS TO JURY: *Erroneous when argumentative and partial.*

1. In a proceeding under the bastardy act, where defendant had continued the cause over one term of the circuit court, and, though he knew that a certain witness might be material, had taken no steps to summon him until a few days before that fixed for the trial, when the witness had left the state to avoid being summoned: *Held*, that there was no error in refusing a further continuance on account of the absence of such witness; especially where, if present, he could not have been compelled to testify to the facts which defendant expected to prove by him.

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2. There is no error in refusing defendant a new trial in such a case, on the ground of newly discovered evidence, where he had been informed three weeks before the trial that the witness from whom such evidence is expected, might be a material witness for him, and neither procured his attendance nor asked a continuance to enable him to procure it.
3. The evidence in this case, as to the paternity of the child, being of a conflicting character, and the questions of fact fairly disputable, and the charge of the court having presented the case on plaintiff's part in a forcible *argumentative* way, without so stating it on defendant's part, and having been expressed in terms from which the jury must have inferred the judge's opinion to be that they should find against the defendant, the judgment against him is reversed, without considering whether a *preponderance* of evidence against the defendant in such a case is sufficient.

ERROR to the Circuit Court for *La Fayette* County.

The case is stated in the opinion.

For the plaintiff in error, there was a brief by *Orton & Osborn*, and oral argument by *Mr. Orton*.

The Attorney General, for the state.

TAYLOR, J. Upon a trial in the circuit court for *La Fayette* county, the plaintiff was adjudged to be the father of a bastard child of one *Ellen Waistell*, and was required to pay the sum of \$350 for the past and future support and maintenance of such child, and the costs of the prosecution, amounting to the sum of \$43.69, and to give bond with sufficient sureties for the payment of said sums; and, on default thereof, to be committed to the county jail of said county until he shall perform such judgment or be otherwise discharged according to law.

The plaintiff in error caused a bill of exceptions to be settled in the action, and brought the record of said action to this court by writ of error. He assigns as error that the learned circuit judge misdirected the jury as to the sufficiency of the evidence necessary to convict in a proceeding of this kind, and that his charge in other respects was erroneous; and that the court erred in refusing to continue the case upon the

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application of the plaintiff in error, and in refusing to grant a new trial on his application upon the ground of newly discovered evidence.

The application for a continuance was, we think, properly denied. The defendant had continued the case over at least one term, and, although he knew that the witness might be material, he had taken no means to summon him until a few days before the day fixed for the trial, when, it appears, the witness had left the state to avoid being summoned. It is also evident from the affidavit of the defendant upon which his application for a continuance was made, that the witness, if present, could not have been compelled to testify to any of the matters which he alleges he expected to prove by him; and the fact that he had left the state to avoid the subpoena would naturally lead the court to believe that if present he would not volunteer to testify to that which the law would not compel him to do.

The motion for a new trial upon alleged newly discovered evidence we also think was properly denied. The proof shows that the defendant had information before he went to trial, that the person he now claims could give material evidence in his favor might be a material witness for him on the trial. Such being the fact, he should have procured his attendance at the trial, or, if that was impossible, he should have asked a continuance in order to procure his attendance. Having been informed, at least three weeks before the trial, that this person could give evidence which would be material to his defense, he should have procured his attendance, or applied for a continuance if such attendance could not be then had; and, having gone to trial without attempting to procure his attendance or asking for a continuance on account of his inability to have him present, the new trial asked in order to procure his testimony was properly denied.

In order to present clearly the exceptions taken by the plaintiff in error to the charge of the learned circuit judge,

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given to the jury upon the trial of this action, it is, perhaps, necessary to state the whole charge. It was brief, and as follows:

"1. The question is: Is the defendant the father of the child? If he is, your verdict should be guilty.

"2. If you are not satisfied, from a preponderance of evidence, that he is the father of the child, you should say, not guilty.

"3. The mother, Ellen, may very certainly be presumed to know who begot the child. You are to consider whether every instinct and emotion of maternal love and affection does not naturally rise up in revolt at the idea of fastening, by perjury, a false paternity upon the offspring of her body.

"4. The defendant denies the charge. You are to judge between them, and give the *preponderance* to the one that you think, under the circumstances, entitled to the most credit.

"5. If the defendant is the father, it probably, according to human experience, must have been begotten at an earlier period than that fixed by the girl. It is proper, in this connection, to consider whether it is not easier to remember a potential fact than to remember its precise date.

"6. It is considered well established that it is not impossible for a child to be born healthy and live to maturity at seven months from conception, although it is not according to the common course of nature.

"7. The fact of the girl having testified to the month of July before she was delivered, is a circumstance to be considered regarding her credibility. You will consider whether the explanation, that she intended to say June, is reasonable and satisfactory.

"8. It is said that it is a charge easy to make. Is it true that any woman, however lost to virtue and to truth, is likely to charge a man with having had sexual intercourse with her, when it is not true?

"9. If, from sheer recklessness, a woman can be regarded

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as capable of fastening a false paternity upon her child, is it probable that she would select a man who has children as old as herself, rather than some one near her own age, it being shown that younger men were equally accessible upon whom to fasten the false charge?

"10. If you argue that the prosecution of the defendant is purely mercenary, it is proper to consider whether the defendant is a more eligible victim to fasten the assumed fraud upon, than others against whom the charge might be made; and if not, what becomes of the argument?

"11. With regard to the prosecuting witness, judging from her age, her appearance upon the stand with a child in her arms, in the presence of her father, standing before the court and jury and a listening and criticising audience, is she such a person as to be capable of confronting the accused, and solemnly swearing that he is the father of her child, if he never had had sexual intercourse with her? If you think she is of that sort, you should acquit the accused. If you believe her, you should say, guilty."

To each separate paragraph of the charge, as above given, the counsel for the plaintiff in error excepted. In the determination of this case we shall not pass upon the question raised by the exceptions to the second and fourth paragraphs of the charge, as the members of this court entertain different views upon the point raised by these exceptions, and as we all agree that the judgment must be reversed upon the exceptions taken to the remainder of the charge.

It is well said that the object of a charge to a jury is to lay before them a full and impartial statement of the whole case as presented by both sides; and as a general rule it is better that the judge should refrain from expressing any opinion upon the questions of fact in the case, or upon the credit which, in doubtful cases, should be given to the testimony of the witnesses. It is urged by the learned counsel for the plaintiff in error, that this charge is partial in that it pre-

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sented only the plaintiff's side of the case to the jury, and that in presenting that side it was so presented that the jury could not but infer that it was the decided opinion of the judge that the evidence as a whole sustained that side, and their verdict ought to be for the plaintiff. In looking at the whole charge, we are forced to the conclusion that it is subject to the criticism made upon it by the learned counsel. There can hardly be a doubt that every man upon the jury, after hearing the charge, was of opinion that the learned judge thought the verdict ought to be in favor of the plaintiff. It is true, he did not say in express language that he held that opinion; yet the forcibly argumentative way in which he presented the case on the part of the plaintiff, and the entire omission to present the case on the part of the defendant, could have had but one effect upon the jury; and that was, that the plaintiff, in the opinion of the court, had made out a case, and that the defendant had failed in his defense.

It is urged by the counsel for the state, that the utmost that can be said against the correctness and propriety of this part of the charge is, that it is only the expression of an opinion of the learned judge as to the credibility of the witnesses, and his opinion that, upon the whole evidence, the plaintiff was entitled to the verdict; that there was no direction on the part of the learned judge to the jury that they ought to find in conformity to his opinion; but that the whole question as to the guilt of the defendant was left to the jury for their determination upon their own judgment of the matter, and wholly uninfluenced by any views of the court upon the questions of fact.

It was decided long ago by the territorial court, that in a civil action "an opinion as to a fact not given as binding on the jury was not error." *Fowler v. Colton*, 1 Pin., 331, 337-8. And this decision was commented upon, and to a limited extent approved by this court, in the case of *Ketchum et al. v. Ebert*, 33 Wis., 611. The rule approved in this case

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is, "that the mere expression by the judge to the jury of an opinion as to the facts of the case, the weight of evidence or the character of a witness, may not be error, when the question is still left for the determination of the jury; yet, if the expression of opinions is made in such manner that the jury naturally regard it as a direction to them, and as excluding them from finding the facts for themselves, there being evidence proper for them to consider, both for and against such direction, this is a fatal error." The same case, as well as the cases of *Benedict v. State*, 14 Wis., 424, and *Hill v. State*, 17 Wis., 675, holds that in criminal cases the rule is more stringent, and that in such cases it is error to express any opinion to the jury as to the weight or sufficiency of the testimony upon any fairly controverted or debatable question of fact.

In the case of *Vedder v. Fellows*, 20 N. Y., 126-130, it is said: "The better rule is, that while a judge may comment on the weight due to the testimony of witnesses, he cannot rightfully state to the jury his conclusions as to any questionable or disputed facts. The difficulty is not cured by an announcement to the jury that the question was one of fact for their determination, and if they should not concur in his conclusion they might decide the other way. In most instances the jury would concur with the expressed opinion of the court on questions of fact."

It may be said that the learned judge did not, in his charge, in express words state to the jury his opinion as to the credit which they ought to give to the complainant as against the defendant, nor to which side he considered the whole testimony preponderated, and that therefore the charge is not subject to the objection that he expressed to the jury his opinions upon these questions with a view of controlling their judgment.

We think it is impossible to read the charge of the learned judge without being fully convinced that he intended to convey to the jury, not only that it was his opinion that the

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complainant ought to be believed by them rather than the defendant, but that it was also his opinion, upon the whole evidence, that they ought to find a verdict in favor of the plaintiff. If the learned judge had simply said to the jury, "In my opinion the complainant is entitled to more credit as a witness than the defendant, and I am also of the opinion, upon the whole evidence, that the plaintiff ought to have your verdict; still these are questions of fact for your determination; take the case, and decide it upon the whole evidence in the case," the effect upon the jury would not have been as prejudicial to the defendant as the charge given. If he had thus stated the case, it would have been the expression of a mere opinion, unsupported by any argument. In the charge given, the opinion of the court was not only transparent, but it was supported by cogent arguments, which could not fail of tending to induce the jury to follow it.

Treating this case as one in which the rule applicable to civil actions must be applied, we are still of the opinion that the charge did not fairly state the whole case to the jury, and that the opinion of the learned circuit judge as to the credibility of the testimony given by the complainant, as contrasted with that of the defendant, was palpably in favor of the complainant, and was so urged upon the jury by argument that it must have had the same weight with them as if it had been an express direction to them to so find, and was therefore erroneous within the decisions above quoted.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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GORDEN vs. ROBERTSON and others.

February 5 — February 24, 1880.

48	493
102	34

Alteration of Promissory Note.

1. An alteration of a note after execution, not made with fraudulent intent, by the person claiming under it, or with his consent, will not invalidate the instrument.
2. The effect of a fraudulent alteration upon the payee's right to maintain an action upon the original indebtedness for which the note was given, not here considered.

APPEAL from the Circuit Court for *Monroe* County.

Action against *Nicol Robertson*, *Elizabeth* his wife, and *B. E. McCoy*, to foreclose a mortgage, and for a personal judgment against *Nicol Robertson* upon the note secured thereby, for any deficiency. The facts found by the court were as follows:

On the 1st of February, 1873, plaintiff loaned *Nicol Robertson* \$500. To secure repayment of that sum four years from that day, with interest at ten per cent. per annum, *Robertson and wife* executed to plaintiff the note and mortgage described in the complaint. Afterwards, and before March 1, 1875, without the authority or knowledge of the defendants, the note was altered by adding to the provision for interest therein, the words "payable annually." This alteration was made while the note was in plaintiff's custody or control, and was made in his interest and for the purpose of enabling him to recover the interest on said note sooner than it became due by the terms of the note. About March 1, 1875, plaintiff commenced an action to foreclose the mortgage for the amount of interest then appearing to be due upon the note as altered; but, upon defendants setting up such alteration as a defense, the action was discontinued. Before the commencement of the present action, the words "payable annually" were erased from the note, while it was in plaintiff's

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iff's custody or control, and without defendant's knowledge or consent. The defendant *McCoy* bought the mortgaged premises after the recording of the mortgage. About May 15, 1874, *Robertson* paid \$100 on the note, and no other sum has been paid thereon.

On these facts the court held, as conclusions of law, that by said alteration the note became void; that the subsequent erasure did not restore its validity; that the alteration did not extinguish the original debt for which the note was given; that the mortgage is a security for the debt, and not merely for the note; and that plaintiff was entitled to a judgment of foreclosure and sale for the amount of the original loan with lawful interest (after deducting the payment made), with costs, etc. From a judgment in accordance with the decision, the defendants appealed.

For the appellants, there was a brief by *Graham & Helms* and *Bleekman & Bloomingdale*, and oral argument by *Mr. Graham* and *Mr. Bleekman*.

For the respondent, there was a brief by *Morrow & Masters*, and oral argument by *Mr. Morrow*.

COLE, J. The findings of fact fail to sustain the line of defense set up in the answer. That defense is, that, after the execution of the note and mortgage, the plaintiff, fraudulently and with intent to cheat and wrong the defendants, altered the note by adding thereto words which made the interest "payable annually;" and that, after discontinuing the action which was commenced to foreclose the mortgage for the interest which appeared to be due, the words "payable annually," which had been fraudulently inserted, were falsely and skillfully erased, so as to restore the note to its original condition. Now it is claimed by the learned counsel for the defendants, that such a fraudulent change and alteration of the note destroyed the instrument and extinguished the debt for which it was given. If the evidence satisfactorily showed — as we

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think it does not — that the alteration was made by the plaintiff, or by another with his knowledge and consent, with a fraudulent purpose, we should have to determine the question as to the effect of such an alteration upon the securities. We are not aware that this precise question has ever been passed upon by this court, and the view which we take of the testimony renders it unnecessary to decide it now.

We infer, from some remarks in the opinion of the learned circuit judge which was filed in this cause, that he deemed it unimportant, under our decisions, whether the alteration was made, by the party claiming under the instrument, with or without a fraudulent intent; that still there could be a recovery upon the original consideration. But the case of *Matteson v. Ellsworth*, 33 Wis., 488, which is referred to in support of that view, does not lay down any such doctrine, whatever may be the logical result of the decision. There the effect of an alteration of a promissory note by the payee, without the consent of the maker, made under an honest mistake of right, was considered; and it was held that such an alteration would not prevent a recovery on the original consideration. But in that case there was no question that, if the note had been altered by the plaintiff, it was done innocently, for the purpose of making the amount of the note conform to the contract as she understood it. The court did not go beyond the facts presented, and the question as to the effect of a fraudulent alteration was left undetermined.

In this case there is considerable evidence which tends strongly to prove that there was a double change or alteration of the note. There is really nothing suspicious in the appearance of the instrument, or which tends to detract from its credit. But, upon holding the paper up to the light, something seems to have been erased in the left hand corner. The plaintiff testified that he never saw the note when the words "payable annually" were written on the left hand side; that he never instructed or authorized any person to write

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those words in the note; but that the understanding was, when the loan was made, that the interest should be paid annually. His testimony upon the last point derives very strong confirmation from the letter written by the defendant *Robertson*, dated May 8, 1874. And, did the evidence clearly establish the fact that the plaintiff himself wrote the words "payable annually" in the note, in order to make it conform to the contract as he understood it, the case would come fully within the decision in *Matteson v. Ellsworth*. But the plaintiff denies all knowledge of any alteration or erasure having been made in the note, and says, in substance, that if any ever was made, it was done by some person without his consent or authority, and for whose acts he is not responsible. We do not feel authorized, under the circumstances, in assuming that the plaintiff has testified falsely upon this point.

Of course, the burden of proving that the note had been fraudulently altered by the plaintiff, was upon the defendants. They have certainly produced considerable testimony tending to prove a double alteration or change in the note. Their counsel argue and insist that this testimony states the real truth of the matter, and should be followed by this court. But when we consider the fair appearance of the note on its face, and the denial by the plaintiff of all knowledge of any alteration, if one was made, we do not feel justified in holding that the defense set up in the answer was established by the proofs. It is quite obvious that this was the view which the learned circuit judge took of the evidence, because he failed to find as a fact that there was a fraudulent alteration of the note by the plaintiff for the purpose of defrauding the defendants. This was a very material issue, and the circuit court would doubtless have found upon it in favor of the defendants, had the evidence warranted such a finding.

By the Court.—The judgment of the circuit court is affirmed.

Healy vs. Kneeland and others.

HEALY vs. KNEELAND and others.

February 5 — February 24, 1880.

CERTIORARI TO J. P. (1) *Return of double docket record.* (2) *Question raised by the writ, and proper judgment thereon.*

COSTS: (3) *In supreme court, on part affirmance.*

48	497
103	242
48	497
112	1258

1. To a common-law *certiorari* from the circuit court, a justice of the peace made return of two distinct docket records of the case, both signed by his predecessor (who rendered the judgment) and properly certified; one of which was full in its entries to show jurisdiction. *Held*, that, in the absence of anything in the return to prove the contrary, it must be presumed that both records were kept at the same time; and an affidavit subsequently filed in the circuit court to show that the fuller record was not made at the time nor by the justice, could not be considered.
2. The question on such a *certiorari* being merely of the justice's *jurisdiction*, the judgment of the circuit court should simply affirm or reverse that of the justice.
3. Where, in such a case, the circuit court further awarded to the defendant in error a judgment for the amount recovered by him before the justice, this court, on appeal, affirming in part and reversing in part, denies costs here to either party, but requires the respondent to pay the clerk's costs.

APPEAL from the Circuit Court for *Trempealeau* County.

The action was brought before Isaac Noyes, Esq., a justice of the peace, and was regularly removed to Lyman Cowdery, Esq., another justice of the peace of the same county. A trial was had before the latter justice, and resulted in a judgment for the plaintiff. The defendants thereupon removed the case to the circuit court by a common-law writ of *certiorari*. The writ was directed to, and return thereto made by, the successor of Justice Cowdery—James M. Barrett, Esq. The return contains copies of two separate and distinct docket records of the case, both signed by Justice Cowdery and properly certified. The contents of these records are sufficiently stated in the opinion.

The circuit court affirmed the judgment of the justice, and gave judgment for the plaintiff for the amount of his recovery

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before the justice. The defendants appealed from the whole judgment.

G. Y. Freeman, for the appellants.

The cause was submitted for the respondent on the brief of *S. W. Button*.

LYON, J. The entries in one of the docket records made by Justice Cowdery are very full and complete, showing affirmatively regular and valid proceedings in the cause from its commencement to the rendition of the judgment. The other docket record is as follows:

"January 24. Suit sworn from Isaac Noyes on the oath of *A. H. Kneeland*, one of the defendants. Cause adjourned to the second of February, 1877, at 10 A. M. Heard the case. Adjourned by consent of parties to the twelfth of February, 1877, at 10 A. M. Adjourned to the nineteenth of February, at 10 A. M., by consent of parties, at my office in Trempealeau. February 19, 1877. Case held open to the twentieth day of February, 1877, at 10 A. M., at my office, for the defendant to make his argument. The defendant did not appear.

"10 A. M., February 20, 1877, is considered by me that the plaintiff have and recover of the defendants the sum of \$151.80, and the costs, taxed at \$39.09."

Unless there is something in the case which excludes the first docket record above mentioned from the consideration of the court, the judgment of the justice was correctly affirmed. The record proper returned to this court contains nothing whatever which would have justified the circuit court in disregarding that docket record.

We find in the return an affidavit of defendant's attorney, filed in the circuit court at the term the cause was argued, and long after return had been made to the *certiorari*, to the effect that the docket entries first above mentioned were not made until at least twenty days after the justice rendered judgment in the action, and that they were written by some person other

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than Justice Cowdery. It is perfectly clear that this affidavit cannot be considered. The case must be determined by the record as returned to the circuit court, and not upon *ex parte* affidavits filed in that court. *Newcomb v. Trempealeau*, 24 Wis., 459. By the return, and that alone, the judgment must stand or fall. To try a question of fact *aliunde* the record in a cause brought to the circuit court by a common law *certiorari* to a justice of the peace, would be very novel practice.

Rejecting the affidavit, one of these docket records is just as potent as the other. The entries in both may have been made *pari passu*, as the cause progressed. The return of the justice not showing the contrary, we must presume, in favor of jurisdiction, that they were so made. One of them being unexceptionable, and showing that the justice had jurisdiction to render the judgment, such judgment was properly affirmed.

We are strongly inclined to the opinion that the entries in the other docket record are also sufficient to show that the justice had jurisdiction of the cause and the parties, and that on that record alone the judgment should be affirmed. It shows that the defendants appeared before Justice Cowdery, went to trial without objection, and consented to every adjournment. But we do not determine whether that record alone will support the judgment. It is sufficient that it is fully sustained by the other record.

The circuit court should have affirmed the judgment of the justice, with costs, without rendering a judgment for the plaintiff for the amount he recovered before the justice. The practice here pursued would be correct on appeal, but not where the case is removed to the circuit court by *certiorari*. The reason for the distinction will appear at a glance. On appeal the court tries the case on the merits, and is prepared to give the proper judgment. On *certiorari* to bring up the judgment of a justice of the peace, the court does not try the merits. Whether the judgment is too large or too small, whether in favor of the party justly entitled thereto or not, are

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questions not to be considered. The sole inquiry is, Had the justice jurisdiction to render the judgment? That question is answered by affirmance or reversal, and there the court stops. An affirmance leaves the judgment of the justice in full force; a reversal destroys it absolutely.

Hence, that portion of the judgment of the circuit court which awards to the plaintiff the amount of the judgment recovered by him before the justice must be reversed, and the residue thereof affirmed.

No costs in this court are awarded to either party, except that the respondent must pay the clerk's fees.

By the Court. — Ordered accordingly.

HARRIS VS. KENNEDY and another.

February 5 — February 24, 1880.

CONTRACT. (1) *Compromise of disputed claim.*

CHATTEL MORTGAGE. (2) *Description of property.*

1. Where A. claims in good faith to have a valid mortgage of chattels, which B. has purchased since the date of the mortgage, and thereupon the parties agree, by way of compromise, that B. shall pay, and A. receive in full satisfaction of his lien upon the chattels, a sum less than that supposed to be secured by the mortgage, this is a valid contract.
2. A mortgage of cattle is not invalid because it describes them incorrectly as to their age, where it clearly appears from the evidence what cattle were intended; and especially will it be so held where the party claiming in opposition to the mortgage was not misled by the erroneous description, and could not have been so misled, in the exercise of ordinary care.

APPEAL from the Circuit Court for Trempealeau County.
The case is thus stated by Mr. Justice TAYLOR:

"This action was commenced in a justice's court. The complaint is as follows: 'The plaintiff alleges that before and until the first day of October, 1877, he was the owner of a

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yoke of young cattle, which was of the value of \$60; that on or about that day defendants wrongfully took possession of said property, and wrongfully converted the same to their own use; that afterwards, on or about February 10, 1878, the defendants agreed to pay plaintiff the sum of \$45, in consequence of the aforesaid wrongful taking and conversion, in the course of ten days or two weeks from that day, which plaintiff agreed to receive in full; but that the defendants have not paid the same, or any part thereof. Wherefore the plaintiff demands judgment for the sum of \$45, and costs of the action.' The answer was a general denial.

"Upon the trial in the circuit court, the evidence showed that the plaintiff claimed to have a chattel mortgage upon a yoke of cattle owned by one Polubinski; that the mortgage was given by Polubinski to the plaintiff to secure a debt due the plaintiff from him for \$75; and that the cattle were described in the mortgage as 'one yoke of oxen four years old,' and the mortgage was on file in the proper town clerk's office, when the defendants purchased the same of the mortgagor and converted them to their own use. The evidence on the part of the plaintiff further showed, that, after the defendants had purchased the oxen, they were notified by the plaintiff that he claimed to have a chattel mortgage on them; that he had an interview with one of the defendants, in which he admitted the defendants had purchased a yoke of oxen of Polubinski and converted them to their own use; and that the defendants agreed to pay the plaintiff \$45, and plaintiff agreed to accept the same as a settlement and satisfaction of his claim to the cattle.

"The defendants' evidence shows that they received notice that plaintiff claimed the cattle by virtue of a mortgage, and that after such notice one of the defendants called upon the plaintiff in regard to the matter. This defendant gives a different version of the interview, and says he did not promise to pay \$45, but said he supposed, if the plaintiff had a mort-

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gage on the cattle they bought of Polubinski, they were good for it and would have to pay for them again; that he told the plaintiff they had bought the cattle for \$45, and that plaintiff said if they had bought them for \$45, all he wanted was the \$45.

"The evidence on the part of the defendants showed that the cattle were younger than described in the mortgage. One of the witnesses on the part of the plaintiff gave the age of the cattle as described in the mortgage. The whole evidence in the case clearly showed that Polubinski had no other oxen except the yoke bought by the defendants, at the time the mortgage was given, or at any time thereafter up to the time the defendants purchased. When the plaintiff rested, the defendants moved for a nonsuit, which was denied, but no exception was taken by the defendants. The jury returned a verdict for the plaintiff."

A new trial was refused; and defendants appealed from a judgment in plaintiff's favor.

G. Y. Freeman, for the appellants.

The cause was submitted for the respondent on the brief of *S. W. Button*.

TAYLOR, J. The case was tried upon the theory that it was necessary for the plaintiff to show that he had a valid mortgage upon the oxen at the time the defendants purchased them; and the circuit judge, in his instructions to the jury, so charged. This theory of the case was certainly the most favorable to the defendants; and if, upon the evidence, the verdict can be sustained upon that theory, there can be no ground of complaint upon their part. We are inclined to think that the plaintiff might have rested his case, as he did in the first instance, upon the claim that there had been a compromise and settlement between him and the defendants, by the terms of which the defendants had agreed to settle his claim made against them for these cattle by reason of the mortgage which

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he claimed to have on them, and to pay him \$45 for such claim, and that he had agreed to receive the \$45 in full for such claim. In this view of the case, it would have been unimportant whether he had a valid mortgage or not. He claimed in good faith that he had a valid mortgage, and the defendants, if the plaintiff's evidence is to be believed, waived their right to contest the validity of such mortgage in consideration of his agreeing to take \$45 in full satisfaction of his claim.

The plaintiff, proceeding upon this view of the case, did not offer his chattel mortgage in evidence before he rested, but contented himself by stating that he had such a mortgage and his claim under the same, and the agreement of the defendants to pay him on account thereof the sum of \$45, which he consented to take in full satisfaction of his claim. Though the learned circuit judge did not, it seems, take this view of the case, he refused to nonsuit the plaintiff, and permitted the defendants to contest the validity of his mortgage. The defense attempted to be made was, that the mortgage on file did not describe the cattle bought of Polubinski by the defendants. The cattle were described in the mortgage as four years old at the date of the mortgage, and the defendants claimed that the evidence showed that the cattle they bought were but two and one-half years old at that date.

There was no such exception taken to the charge of the court by the defendants on the trial as entitles them to a review of the charge. The exception was a general exception to the whole charge, and it will hardly be concluded that it was erroneous in its entirety.

Upon the motion for a new trial, which was made at the same term the trial took place, one of the reasons assigned is sufficiently specific, viz.: "That the court erred in its charge to the jury that a chattel mortgage upon a yoke of oxen four years old was good against a *bona fide* purchaser, for value, of a pair of steers two years old." And the defendant raised the

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same question in asking the court to instruct the jury "that a mortgage describing the property as a yoke of oxen four years old is not a valid mortgage, as against an innocent purchaser for value, of a pair of steers that were only two years old at the time the mortgage was given." This instruction the court refused to give, and the defendants excepted. The judge instructed the jury that a mere mistake in the age of the oxen mortgaged would not invalidate the mortgage; that the description was sufficient, if it can be rendered certain by evidence as to what the mortgage was intended to cover; and that, in this case, if the jury were satisfied from the evidence that the mortgagor had but one yoke of oxen at the time this mortgage was given, and continued to have the same oxen, and no others, from that time until the defendants purchased them, the jury would find that the oxen so owned by the mortgagor were the same ones described in the mortgage, and the mistake, if there was any, as to the age, in their description, would not render it void. The learned circuit judge, in his charge, as above stated, undoubtedly stated the law correctly, and he was clearly right in refusing to give the instruction asked by the defendants.

The following authorities in this and other courts fully sustain the learned circuit judge in his instructions in this case: *Sargeant v. Solberg*, 22 Wis., 132; *Harding v. Coburn*, 12 Met., 333; *Barry v. Bennett*, 7 Met., 354; *Lawrence v. Evarts*, 7 Ohio St., 194; *Herman on Chattel Mortgages*, §§ 39, 40, and 41, and cases cited; *Thomas on Mortgages*, 469, and cases cited; *Call v. Gray*, 37 N. H., 428. In the case of *Sargeant v. Solberg*, *supra*, this court held that a chattel mortgage which described the property mortgaged as "fifty cords of wood piled upon lot 1, block 83," etc., was not void, although the evidence showed that there were 85 cords of wood on lot 1 at the time the mortgage was given, owned by the mortgagor. The court below permitted the mortgagee to show by parol evidence that a certain pile of wood on said lot, containing

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nearly 50 cords, was the wood intended to be mortgaged; and upon appeal this court held that such parol evidence was clearly admissible. Justice COLE, in delivering the opinion, says: "It would undoubtedly be a very desirable rule, if it were possible, to describe property mortgaged so that one could ascertain from the face of the instrument itself what property was intended to be embraced therein. But it is evident that resort must frequently be had to parol evidence to apply the description in the mortgage. It is not readily perceived how the description of the wood in this case could have been more certain and specific; and, as there were several other piles of wood on the same lot, it was necessary to resort to extrinsic proof to identify the property."

In the case at bar, the intention of the parties as to what oxen were to be covered by the mortgage was made perfectly evident by showing that the mortgagor had no other cattle which could by any possibility answer to the description in the mortgage, except the cattle in controversy in this action. The court is therefore bound to presume that the intention was to mortgage such cattle; otherwise there would be no property of the mortgagor to which the mortgage could attach.

The defendants cannot, with justice, plead that they were misled by the uncertain description in the mortgage. They made no examination of the clerk's office previous to their purchase, for the purpose of ascertaining whether the cattle were mortgaged. Had they done so, they could not have been misled by the imperfect description, since, by proper inquiries, they would have ascertained that the mortgagor had but one yoke of cattle which would in any respect answer the description contained in the mortgage at the time it was given, or afterwards, and they would at once have arrived at the conclusion that these were the cattle intended to be covered by the mortgage, and would, in the exercise of ordinary prudence, have declined to purchase.

The case seems to have been fairly tried upon its merits,

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and the verdict in favor of the plaintiff is clearly sustained by the evidence, whether the action be treated as an action to recover on the alleged compromise made between the parties, or as an action to recover the value of the oxen upon an alleged wrongful conversion of them by the defendants.

By the Court. — The judgment of the circuit court is affirmed.

WYLIE VS. THE CITY OF WAUSAU.

February 5 — February 24, 1880.

Evidence.

In an action by a practicing physician for injuries from a defective highway of the defendant city, the amount of damages being in question, another physician of the same city, as a witness for the defense, was asked whether he would have known of "any falling off of plaintiff's practice, if that had been the case;" what would have been, during the time since the alleged injuries, a fair amount of patronage *per diem* for an ordinary physician of fair standing, without any physical disability to attend calls; and "what a fair division of the patronage as it existed, on plaintiff's part, would amount to." *Held*, that there was no error in overruling the questions, as not properly calling for the opinion of the witness as an expert, and as tending to substitute his opinion for that of the jury upon a question directly in issue.

APPEAL from the Circuit Court for *Monroe* County.

Action for injuries received by the plaintiff, a practicing physician, while traveling in a buggy at night along a street in the defendant city, in consequence of his buggy striking a log lying in the street, and his horses becoming frightened by the noise and shock, and running away. The complaint alleges that, under the defendant's charter, it was its duty to keep the streets in good order and prevent their being incumbered by anything which would render them unsafe for travel; that the street here in question was one much traveled and used by the citizens; that at the time of the accident, and for a long time prior thereto, it was incumbered at and near the place of

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the accident by great quantities of saw-logs piled to a great and dangerous height on each side of the street; that said obstruction was permitted by defendant to remain in dangerous proximity to the center of the street, leaving so narrow a passage between the piles that teams could not pass each other at that point; that defendant's officers and agents whose duty it was to see that the street was kept in good order, knew or with reasonable diligence might have known of its dangerous condition for a long time before the accident; and that on the night of the accident a large saw-log, against which plaintiff's buggy struck, had been loosened by the melting of the snow under said pile of logs, and had rolled down into the narrow passage for teams aforesaid. Other averments were added to show that plaintiff was driving with due care, etc.

At the trial, defendant objected to the introduction of any evidence under the complaint, on the ground that it did not state a cause of action; but the objection was overruled.

Certain evidence offered by defendant, and rejected, is stated in the opinion.

The plaintiff had a verdict assessing his damages at \$1,800; a new trial was refused; and defendant appealed from a judgment on the verdict.

For the appellant, there was a brief by *Chas. V. Bardeen*, its attorney, with *Silverthorn & Hurley*, of counsel, and oral argument by *Mr. Bardeen*.

For the respondent, there was a brief by *J. A. Kellogg*, and oral argument by *J. M. Morrow* and *Mr. Kellogg*.

ORTON, J. On the trial of this cause, the following questions were propounded to the witness Dr. Searles, which were not allowed, and the appellant excepted:

"Would you have known of any falling off of *Dr. Wylie's* practice, if that had been the case?"

"Is the field of practice there so large that you would not have known if there had been a falling off of *Dr. Wylie's* practice in the last five or six years?"

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“What would be a fair amount of patronage *per diem* for a physician, of the qualifications of an ordinary physician, of fair standing, since the spring of 1872, at Wausau, without any physical disability to attend calls?”

“Can you state what a fair division of the patronage as it existed, on his part, would amount to?”

These questions were clearly not proper as being professional or as addressed to an expert, because no foundation for them had been laid by first ascertaining the witness's knowledge of the facts upon which his opinion as an expert could be based. 1 Greenl. Ev., § 440. In any other view they would not elicit any specific facts bearing upon the issue, or any opinion which would be strictly that of an expert. In *Blair v. The Milwaukee & P. du C. Railroad Co.*, 20 Wis., 262, the question addressed to Persons, the copartner of Blair in trade, was as to the damages to the partnership business caused by his injury and consequent absence. This court held that the witness's opinion upon the subject, although he might give a more accurate judgment than others, because in the same business, was merely conjecture, and did not furnish a safe guide for the verdict of the jury, and was not admissible as expert testimony. In that case it was held further that the testimony was inadmissible because it had a direct bearing upon the question of damages, and was calculated to substitute the opinion of the witness for the judgment of the jury upon the facts of the case.

These questions were very similar in character and effect to the questions, held by this court inadmissible, in the case of *Oleson v. Tolford et al.*, 37 Wis., 327. “State, if you know, from your own knowledge of the condition of the road at the time, what would be the chances for a stage coach to tip over, being driven by an ordinarily prudent driver?” “Was that stage overloaded, in your opinion?”

The statement in the charge of the court, if otherwise fair and impartial, of what “the testimony tended to prove,” is the

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common and approved form of speaking of the evidence at all, in instructing the jury upon the law, and is certainly not a statement of what the testimony *actually* proves. The circuit court distinctly submitted to the jury all questions of fact in language which they could not misunderstand, and we think the general charge was a very full and fair exposition of the law of the case. It appears to us that the charge embraced substantially every principle of the special instructions asked by the learned counsel of the appellant, that the verdict is supported by the evidence, and that the damages are not excessive.

By the Court.—The judgment of the circuit court is affirmed, with costs.

HAYES VS. LIENLOKKEN.

February 5 — February 24, 1880.

- (1) *Record in this state of foreign will and probate: its effect as evidence.*
(2) *Strict foreclosure of mortgage: when not an assignment of mortgage to purchaser.*

1. Where the mortgagee of land in this state is a resident of another state, the record in the county where the land is situate, of an instrument purporting to be his last will, and of the probate thereof in such other state, is not proof either that the mortgagee is dead, or that the person named in such instrument as his executor had authority to act as such in foreclosing the mortgage by advertisement and sale: that not being the purpose or effect of sec. 2295, R. S.
2. A proceeding for a statutory foreclosure of a mortgage, by sale without action, void because made by a person without authority to act for or represent the mortgagee, cannot operate as an assignment of the mortgage.

APPEAL from the Circuit Court for *La Crosse* County.

Ejectment. Defendant claimed under a mortgage sale of the land made by one Davis as surviving executor of one Mooney, the mortgagee, by virtue of a power of sale contained in the mortgage. The evidence relied upon by the defendant

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to show the right of Davis as such executor, will appear from the opinion. The circuit court held the evidence insufficient, and rendered judgment for the plaintiff; from which the defendant appealed.

For the appellant, there was a brief by *Cameron, Losey & Bunn*, and oral argument by *Mr. Bunn*.

For the respondent, there was a brief by *M. P. Wing* and *G. C. Prentiss*, and oral argument by *Mr. Wing* and *P. L. Spooner*.

COLE, J. The defense in this case rests entirely upon the title acquired or claimed under the mortgage given by the plaintiff and her former husband to Linus H. Mooney, in 1858. It is practically conceded that Mooney was a resident and citizen of New Jersey. For the purpose of showing the death of Mooney, and the foreclosure of the mortgage by his executor by advertisement, under the statute, the defendant offered in evidence a record of the office of register of deeds for La Crosse county, which was the record of a certified copy of the probate of the will of Mooney. It was claimed on the part of the defendant, that this record of the copy of Mooney's will, and of its probate in New Jersey, was sufficient evidence of the death of Mooney and of the official character of the person who assumed the right to foreclose the mortgage by advertisement in this state. The final ruling of the circuit court as to the effect of this record was, that it did not establish these facts. The correctness of that ruling is the only question we have to consider. That it was essential to show the right or authority of the person foreclosing the mortgage to act in the matter, seems to us too plain for argument. If the rule were otherwise, then a mere stranger, one who had no earthly right to represent the owner of the mortgage, might go through the form of foreclosure by advertisement and sale, and give a good title.

The able counsel for the defendant would not argue in sup-

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port of any such position. But it is claimed that the record offered was sufficient proof of the authority of the person foreclosing the mortgage to act as executor, by virtue of section 2295, R. S., which reads as follows: "When a will devising lands in this state, or any interest therein, shall have been duly proved and allowed in the proper court of any other of the United States, or the territories thereof, a copy of such will and of the probate thereof, duly authenticated, may be recorded in the office of the register of deeds of any county in which any such lands are situated, and when so recorded, and all such as may have heretofore been so recorded, shall be as valid and effectual to pass the title to such lands as if such will had been duly proved and allowed by the proper court in this state; and the record of such copy, or a duly certified transcript thereof, shall be presumptive evidence of the authority of any person authorized by such will to convey or otherwise dispose of any such lands."

We do not think this section was intended to have the application claimed for it. The provision doubtless has a purpose — a practical object in view. But that object was not to prescribe a rule of evidence, nor declare what should be legal proof of death, and of the authority of an executor to act. The legislature were treating of the subject of wills of realty, instruments which have the effect of conveyances proper, and were providing a method by which the claim of title of lands might be preserved and made known. And hence it provides that a duly certified and properly authenticated copy of a will, devising lands in this state, or an interest in lands, which will has been duly proven and allowed by the proper court of another state, may be recorded in the office of the register of deeds of the county where the lands are situated. When such copy has been so recorded, it is as valid and effectual to pass the title to such lands as though the will had been duly proven and allowed by the proper court of this state.

So far as the devise of real estate is concerned, the provis-

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ion supersedes the necessity of proving anew a foreign will by making the record of the duly certified copy operate as an original probate. That this is the purpose of the provision is rendered more apparent by the preceding section. That declares that no will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed by the courts of this state, except as provided in section 2295. We do not rest our construction of the section so much upon the word "devise" used therein, as upon what seems to be its general design and object. That the word "devise" is sometimes used in wills and in statutes with reference to personal property, was clearly established on the argument by the counsel for the defendant. But we think he misapprehended the real object which the legislature had in view in enacting the section. As we have already said, it was not enacted for the purpose of prescribing a rule of evidence, or declaring what should be sufficient proof of the death of a party, or of the representative character of an executor. But its object was to allow a certified copy of a foreign will, which was duly authenticated, to be recorded in this state for the purpose of affording record evidence of title to lands. Therefore, according to the view we have taken, there was no proof given in the court below that the person assuming to foreclose the mortgage, by advertisement, had any right or authority to act in that behalf; nor did it appear even that the mortgagee was dead.

But it is further insisted that, if the foreclosure proceedings were void, they nevertheless operated as an assignment of the mortgage to the purchaser at the sale. But the difficulty with that position is, that the purchaser was the very party who assumed the right to foreclose the mortgage. If he had no authority to act for the owner of the mortgage in the matter, it was very plain that he could acquire no title to anything, either the debt or the land, by going through the formality of an unauthorized sale. Had the mortgagee, or a person law-

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fully representing him, conducted the foreclosure proceedings, the rule contended for by counsel would apply. Under the circumstances, it has no application whatever.

By the Court.—The judgment of the circuit court is affirmed.

 QUAIFE and wife vs. THE CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY.

February 6—February 24, 1880.

INJURIES FROM NEGLIGENCE: EVIDENCE. (1) *Degree of proof required.* (2, 3) *Testimony of physicians and surgeons as experts.* (2) *Whether witness may form judgment from words as well as acts of person examined by him.* (3) *Cross-examination of party's own witness.* (4) *Excessive damages.*

1. In actions for injuries from negligence, as in other civil actions, all issues of fact are to be determined by the jury upon the preponderance of evidence; and it is not necessary that defendant's negligence should be proven beyond a reasonable doubt.
2. In such an action, the injured person complained of pain and weakness in the hip joint, continuing from the time of the accident to that of the trial; and, *at the request of the defendant*, she submitted to an examination, during the trial, by a number of physicians and surgeons, one-half of them selected by herself and the others by the defense, who all testified that there was no appearance in the hip of physical conditions that would cause the pain complained of. One of those summoned by the plaintiff was then permitted, against objection, to testify that he thought he could tell whether or not she suffered pain from the movement of the hip, judging from all the examination, *including what she said*; and that she gave every indication of suffering pain; that in his opinion she did so suffer; and that the pain, if it existed, indicated some trouble in the hip joint. *Held*, that the evidence was properly admitted.
3. Another of said surgeons, called by the plaintiffs, having testified that in the examination he had discovered nothing in the subject's physical condition which indicated that she was then suffering from the alleged injury, was asked whether there might not have been a fracture of the femur without his having been able to discover it; and he answered, in substance, that it was possible but not probable. *Held*, that it was within the discretion of the court to allow the question, though in the nature of a cross-examination of the party's own witness.

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4. The jury having apparently found that the injuries complained of were serious and permanent, and having awarded plaintiffs a verdict for \$1,800, this court, not being able to say that the finding was unsupported by the evidence, cannot hold the damages excessive.

APPEAL from the Circuit Court for *Monroe* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to recover damages on account of injuries alleged to have been sustained by the plaintiffs by reason of the negligence of the defendant in not keeping a sufficient platform at Glendale, in this state, a station on its road at which passengers were accustomed to get on and off its trains.

"The facts shown upon the trial were, that the defendant had constructed a platform at Glendale, about one hundred and five feet long and about six feet wide, the north end of which was about three feet above the ground, with no rail or other guard, and with no stationary or other light kept thereon at night when the passenger train stopped to receive and discharge passengers at that place; the only lights being those carried in the hands of the station agent, conductor and brakemen. On the 29th. of March, 1878, the passenger train going south stopped at Glendale to discharge and receive passengers in the night-time. The plaintiffs were at Glendale, and desired to take the train for Elroy. In drawing up to the platform, the train was stopped so that the forward end of the ladies' car did not come up to the north end of the platform by about two feet. The plaintiffs, in approaching the train to get on board, started for the forward end of the ladies' car; and *Mrs. Quaife*, being a little in advance, in attempting to get upon the steps of such car, stepped off the end of the platform and fell the distance of three feet or more, and received the injuries complained of.

"On the part of the defendant it is claimed that the evidence shows that a brakeman stood on the platform near the forward end of the ladies' car, with a lamp in his hand, and

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spoke to *Mrs. Quaife* as she approached the cars, and told her there was not room to get on there, and to get on to the other step — that is, the step at the rear end of the smoking car, immediately in front of the ladies' car; that he told her that was the end of the platform; that she said "Yes," and stopped for a moment; that the brakeman stepped around to the steps of the smoking car; that *Mrs. Quaife* stopped and talked with some one; and that when the conductor called "all aboard," she started and walked off the end of the platform. The evidence shows that quite a large number of persons were on the platform when the train stopped; that the train made a very short stop; and that there was considerable hurrying to get aboard the train, and the night was dark. *Mr. Quaife* disputes the statement of the brakeman, and says that the brakeman stood on the front end of the ladies' car, and not on the platform, and thinks his lamp was standing on the platform of the car, and that *Mrs. Quaife* started for the steps of the ladies' car when she fell off the platform. *Mrs. Quaife* swears she did not notice the brakeman at all, and did not hear him say anything to her, and says she saw the steps of the ladies' car, and started to get on them, and stepped off the end of the platform in attempting to do so.

"There was considerable evidence given as to the severity of the injuries received by *Mrs. Quaife*. The jury returned a verdict in favor of the plaintiffs for \$1,800. The defendant's counsel requested the court to give the following instructions to the jury, which were refused, and exception was duly taken, and such refusal is alleged as error in this court.

"1. If the fact of negligence of the defendant is doubtful, the defendant is entitled to the verdict.

"2. It is for the plaintiffs to make out their case, and show that this accident arose from the negligence of the defendant's servants; and if the evidence leaves this point in doubt, they must find for the defendant."

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"The learned circuit judge instructed the jury upon the point presented by these requests, as follows:

" 'It is claimed upon the part of the plaintiffs, that the defendant was negligent in not having a reasonably safe platform, in not having the platform sufficiently lighted, and in not having some person stationed at the point where this accident occurred, to warn persons and prevent their walking off the platform.

" 'It will be the duty of the jury to determine, from all the testimony in the case, whether the defendant was negligent in these respects or either of them. It is the duty of the defendant to have its platform reasonably sufficient and safe in all respects to be used by such persons as may have lawful occasion to use it. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable. But it must be reasonably safe and sufficient for all persons using it, who are themselves in the exercise of ordinary and reasonable care.

" 'If a barrier or guard is reasonably necessary to prevent persons, who are themselves in the exercise of ordinary and reasonable care, from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it to the cars reasonably safe, should be upon the platform at the time of the arrival of trains, and during the time the train remains at the station.' "

The plaintiffs had a verdict for \$1,800 damages; a motion to set it aside on the grounds that it was contrary to the evidence, and that it was excessive, "and for other errors apparent on the record," was denied; and, from a judgment in accordance with the verdict, defendant appealed.

F. J. Lamb, for the appellant:

1. The plaintiffs must prove negligence on defendant's part,

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which caused the injury without fault on their own part. If the fact of negligence be doubtful, or the evidence would justify an inference consistent with the absence as well as with the existence of negligence, the verdict should be for the defendant; and the refusal of the court so to charge was error. *Cotton v. Wood*, 8 C. B. (N. S.), 568; 29 L. J., C. P., 333; *Daniel v. Railway Co.*, L. R., 3 C. P., 216, 222, 591; 37 L. J., C. P., 146, 280; *Baulec v. Railroad Co.*, 59 N. Y., 356. 2. In any view of the case, the damages were excessive. There were no items of expense or loss proven, and by far the larger share of the award is for pain and suffering. Upon this point the testimony of the plaintiff as to the fact of her suffering is contradicted by the entire testimony of the medical experts, on both sides, all of whom swear that there was absolutely nothing wrong in the physical condition of the limb, and nothing which they could suggest as the cause of such pain. The jury have arbitrarily disregarded the proofs, and allowed their sympathies to blind their eyes to the facts. This court has frequently interposed in such cases, and if it could not, a trial would be a mere farce. *Goodno v. Oshkosh*, 28 Wis., 300; *Spicer v. Railway Co.*, 29 id., 580; *Duffy v. Railway Co.*, 34 id., 188; *Patten v. Railway Co.*, 32 id., 524; *Neanow v. Uttech*, 46 id., 581.

William F. Vilas, on the same side, argued that the question put to one of the physicians, admitted under defendant's objection, as to his ability to determine whether plaintiff suffered any pain, judging from his examination *including what she said*, really called on the witness to pronounce upon the credibility of her mere assertion, as against the result of the physical examination; and that it was for the jury, not the witnesses, to say how much her testimony was worth in comparison with the array of facts against her. *Wood v. Railway Co.*, 40 Wis., 582; *Griffin v. Town of Willow*, 43 id., 509; *Churchill v. Price*, 44 id., 542. He also contended that the question was not properly within the limits of a medical

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opinion. A physician may testify whether a certain disorder which he has examined into would cause pain, and its probable character and degree. He might also, perhaps, give an opinion as to what affection or injury of the body, the existence of a certain described sensation would indicate. But when he can find no disorder which in his opinion is adequate to cause physical distress, he has no better means of determining in favor of an assertion of pain by the patient than any other person. Expert witnesses can only be asked to deliver an opinion upon hypothetical questions which represent what may be fairly claimed to have been proven as facts, leaving entirely to the jury the ascertainment of the facts. *Dexter v. Hall*, 15 Wall., 9; *Reynolds v. Robinson*, 64 N. Y., 589; *Woodbury v. Obear*, 7 Gray, 467; 1 Greenl. Ev., § 440; 1 Wharton on Ev., § 452; *Luning v. State*, 2 Pin., 220; *Wright v. Hardy*, 22 Wis., 354; *Eaton v. Woolly*, 28 id., 628. It was also error to permit the plaintiffs, in direct examination of Dr. Beebe, and when he had shown his inability to testify to any *fact* in their favor, to ask him whether there might not have been a fracture of the neck of the femur, which he had not been able to discover. This was in effect deciding that the jury might range the possibilities, in considering what ailed the plaintiff; and permitting them to endeavor to account for the pain on the theory of a fracture of the femur. The answer could be but a mere speculation, and its tendency was to lead away the minds of the jurors from the ascertainment of facts, and the just deductions to be drawn from facts legitimately proven. Such opinions are universally condemned in the books as inadmissible. *Kennedy v. The People*, 39 N. Y., 255 et seq.

For the respondents, there was a brief by *Lusk & Perry*, and oral argument by *Mr. Lusk*. They contended that it was the duty of the jury to find for the party in whose favor the evidence, in their judgment, preponderated, although it was not free from reasonable doubt; and that the instruction on

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that point asked by defendant was properly refused (3 Greenl. Ev., p. 28, sec. 29; *Blaeser v. Insurance Co.*, 37 Wis., 35); and that the verdict should not be set aside as excessive unless it bore marks of passion, prejudice, partiality or corruption. *Bass v. Railway Co.*, 42 Wis., 672; *Birchard v. Booth*, 4 id., 78. They also contended, on the evidence, that the damages awarded were not excessive, nor even compensatory.

TAYLOR, J. The instructions given by the court and recited above were not excepted to by the learned counsel for the defendant; and they undoubtedly presented the questions involved in them fairly to the consideration of the jury.

The learned counsel for the appellant insist that the instructions asked should have been given; that the true rule as to the sufficiency of the evidence on the part of the plaintiff, in an action charging the defendant with negligence, was correctly stated in these requests—that is, that before the jury can find in favor of the plaintiff, they must find that the evidence leaves no doubt as to the fact of such negligence. If the rule as stated in these instructions must govern, then more plenary proof of the fact in issue would be required in these cases than is now required in criminal actions. In such cases the jury are to be satisfied of the guilt of the accused only beyond a reasonable doubt in order to convict; but these instructions would require the jury to find the negligence of the defendant proved, not only beyond a reasonable doubt but beyond any doubt, reasonable or otherwise, before the plaintiff could recover.

We think the learned counsel is mistaken in his application of the rules of evidence to a case of this kind. The cases cited to sustain it fall far short of doing so. The cases most favorable to the learned counsel's proposition go no further than holding that where the evidence of negligence offered by the plaintiff is equally consistent with the absence as with the existence of negligence, then the plaintiff fails in his proofs.

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Baulec v. R. R. Co., 59 N. Y., 356, 366, and cases cited. But when the plaintiff's evidence tends more strongly to prove negligence than it does the absence of negligence, then, like all other questions in a civil action, the question is for the jury, and their verdict is to be governed by the preponderance of evidence, and not upon the absence of all doubt as to the truth of the facts sought to be proved. The true rule was stated by this court in *Blaeser v. Ins. Co.*, 37 Wis., 31-38, thus: "In civil actions it is the duty of the jury to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although it is not free from reasonable doubt;" and this rule applies to every issue of fact in the case.

In the case of *Hart v. Hudson River Bridge Co.*, decided in the court of appeals of New York, reported in the *Albany Law Journal* of February 14, 1880, p. 134, the rule as to when the question of negligence is one for the jury, is stated as follows: "It is incumbent on the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the injury; it is not necessary to do this by positive and direct evidence of the negligence of the defendant and of freedom from negligence of the plaintiff. Circumstances may be shown from which an inference of the necessary facts may be drawn; and when the circumstances are such that the inferences to be drawn are not certain and incontrovertible, but may be differently made by different minds, it is for the jury to determine them. And it is not necessary to warrant this court in adjudging that there was error in granting a nonsuit, to be convinced that the legal probabilities are so strong as that the plaintiff is entitled to a verdict." Substantially the same rule is laid down by this court in the following cases: *Duffy v. Railway Co.*, 32 Wis., 269, 273; *Patten v. Railway Co.*, id., 524, 531; *Wheeler v. Town of Westport*, 30 Wis., 392, 406; *Sutton v. Town of Wauwatosa*, 29 Wis., 21, 33.

The request of the defendant to instruct as above stated was

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properly refused, and the jury were fairly instructed upon the question of the proof of negligence on the part of the defendant, as well as the proof of contributory negligence on the part of the plaintiffs.

It was claimed by the defendant, on the trial of this action at the circuit court, that the plaintiff *Mrs. Quaife* was not injured to the extent asserted by her; that she was feigning sickness, lameness and debility for the purpose of enhancing the damages; and a large part of the evidence on the part of the defense was introduced to sustain that claim. During the trial *Mrs. Quaife* submitted to an examination by six surgeons and physicians, three selected by her and three by the defendant; and, after making their examination, they were all sworn upon the trial, and all united in saying that they could discover nothing in her physical appearance which would indicate that she was suffering the pains, weakness and lameness which she claimed on her part to be laboring under, and which had been, as she claimed, continuous from the time of the accident to the day of the trial. In this state of the evidence upon this question, the learned counsel for the defendant claims that the circuit judge erred in permitting one of the medical men summoned by the plaintiff to answer the following questions:

"*Question.* Do you think that you could tell whether or not she suffered pain by the movement of the hip, judging from all the examination, including what she said? *Answer.* I think I could. *Q.* Now go on and state whether in your opinion she did suffer pain? *A.* She gave every indication of suffering pain. *Q.* In your opinion did she suffer pain? *A.* Yes, sir; that is my opinion, that she did. This pain, if it exists, indicates some trouble in the hip joint."

These questions were all objected to, and exception taken to the admission of the answers as evidence in the case. In order to determine whether the answers to these questions were properly admitted in evidence, it is, perhaps, necessary that

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the whole testimony of this witness, given as well before as after the answers, should be stated. On the direct examination, and before the above questions were asked and answered, he stated:

"I am a physician and surgeon. I assisted at the examination of *Mrs. Quaife* yesterday. During the examination she seemed to be quite nervous, and more or less excited; she complained of considerable palpitation of the heart. I think she said she felt it every day more or less. I assisted in the examination of the thigh and hip. I didn't find any physical indications or signs of injury."

Here followed the questions and answers above given, and which were objected to; and, immediately after answering such questions, the witness was cross-examined, and testified as follows: "I found nothing in the hip by examination; there must be some defect in the limb to produce pain, and that defect I could not find. The general opinion was that we could not find anything. The only way I could tell that she ached was by what she said, and how she looked and appeared." On a re-direct examination he testified: "I experimented for the purpose of detecting whether there was pain or derangement of the hip joint, by striking on the bottom of the foot; and that seemed to give her pain in the hip joint." The foregoing is all the testimony given by this witness on the trial.

It is very earnestly insisted by the learned counsel for the appellant, that upon this evidence the questions were improper, for the reason that it was in effect asking the witness whether he believed the statement of the plaintiff *Mrs. Quaife*, made at the time of the examination and as a witness on the trial, that she suffered pain. It is argued that as the witness had sworn that he could find nothing in her physical condition that indicated the existence of pain, or which suggested the possibility of such pain, his answer must necessarily be based upon what she said alone; and that if based on that alone, it could only be an opinion of the witness as to the veracity of the plaintiff.

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The claim of the plaintiffs on the trial was, that *Mrs. Quaife* was lame in her hip, and that she suffered pain there; that she was and had been unable to use her limb as she had used it before the accident; that it was so weakened and injured by the accident that she could not for a long time use it at all for the purpose of walking; and that it was still so weak and painful as to render it unsafe for her to attempt to walk without the aid of a crutch. The examination of physicians made upon the trial was made at the suggestion of the defendant, for the purpose of testing the truthfulness of this claim on the part of the plaintiffs, and to place before the jury the real condition of *Mrs. Quaife*, so far as such condition could be ascertained by the experience, knowledge and skill of the expert medical witnesses. The examination was promptly submitted to by *Mrs. Quaife*.

The experts, after the examination, were put on the stand as witnesses, for the purpose of giving the jury the facts ascertained by them from such examination. We are of the opinion that these experts would, in this case, be in the same position as if they had been called in any other case of sickness or injury to attend a patient, and determine, so far as they could, the real condition of such patient. In this case the patient complained of pain in the hip and lameness of the limb as amongst her troubles. The experts examine the limb and hip, and find no such appearance as would indicate lameness or pain. Yet the patient insists upon the fact of lameness and pain. It becomes then a question with the experienced physician, whether such pains and lameness are imaginary, feigned or real; and, to determine this, he must resort to other evidences than those to be derived from an examination of the limb itself. And in such case we think it is clearly competent for the expert to give an opinion from the general appearance, actions and looks of the patient, and what she says at the time in regard to her condition.

Although the examination in this case was not made for the

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purpose of giving medical advice, still it was made for the express purpose of ascertaining whether the plaintiff was suffering from the existence of a present disease, and the nature of such disease; and for the ascertainment of that object the statements of the patient, or person examined, would be as necessary for the enlightenment of the medical experts as though the examination were made with the purpose of administering remedies. It is true that statements made by the person claiming to be injured, made pending an action to recover damages for such injury, might not be entitled to the same weight as if they had been made before an action commenced and for the purpose of getting medical advice; still this objection does not go to the competency of the evidence, but to its credibility.

Both parties on the trial seem to have conceded that the statements made by the plaintiff to the examining physicians were competent evidence, both for and against her; and this was undoubtedly the correct view of the case. The experts in making the examination would naturally and necessarily, in order to make a fair one, inquire of the person to be examined whether she suffered pain or otherwise, where the pains were located, how long they had existed, and such other questions as their superior knowledge and skill would suggest for the purpose of determining whether her assumed illness was real or feigned; and, having made all proper physical examinations, they would form an opinion from her statements and such physical examinations, whether the disease was feigned or real. If, in order to make a fair examination of the plaintiff by the experts, it was necessary or proper to interrogate her at all as to her present condition, then it seems to us that it is clear that, in giving an opinion as to her present condition, her answers to such inquiries must necessarily be taken into consideration, as well as her actions and appearance.

We think the rule applicable to this case is correctly stated by Chief Justice BIGELOW in the case of *Barber and wife v.*

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Merriam, 11 Allen, 322-324: "The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms, and the causes which have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent, as coming from an expert. But it is obvious that it would be unreasonable, if not absurd, to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. Such a course of practice would take from the consideration of court and jury the means of determining whether the judgment was sound, and his opinion well founded and satisfactory. . . . The party producing the witness, and who relies on his opinion, should be allowed the privilege of showing that his testimony, as an expert, is the result of due inquiry and investigation into the condition and symptoms of the patient, past and present. . . . The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury, can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded." See, also, *Bacon v. Charlton*, 7 Cush., 581-586; *Aveson v. Kinnaird*, 6 East, 196; *Thompson v. Trevanion*, Skinner, 402; 1 Greenl. Ev., 102; *Palmer v. Crook*, 7 Gray, 418; *Rowell v. City of Lowell*, 11 Gray, 420; *Railroad v. Sutton*, 42 Ill., 438; *Denton v. State*, 1 Swan (Tenn.), 297; *Le Marchant's Gardner Peerage Case*, 78, 175, 178.

It has been held in some cases, that statements of the kind above mentioned, made after suit brought, should not be received for any purpose, not even for the purpose of in part founding an opinion upon them by an expert. We think, however, the true rule on this point is also stated in the case first above cited. Chief Justice BIGELOW, in his opinion, page 326, says: "It is suggested, in behalf of the defendant, that

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the statements in the present case were made by the plaintiff after the commencement of the action. But we do not think that for this reason only they ought to have been rejected. It was a circumstance which may have detracted from the weight of the evidence of the opinion of the physician, so far as it was founded on these statements. But as the statements were made to a medical man, for the purpose of receiving advice, they were competent and admissible." And so, in this case, the defendant having called for personal examination of the plaintiff, by expert witnesses, for the purpose of determining whether the plaintiff was suffering from disease or injury, and with a view of having those witnesses testify as to the results of such examination, and give their opinions if called upon, the plaintiff had the right to have them take into consideration her statements made upon such examination, in making up their opinions as to her present condition.

It would have presented a different question, if the plaintiff on her part, without the knowledge or presence of witnesses for the defendant, had called experts to examine her as to her present condition, for the purpose of giving evidence on the trial, and not for the purpose of giving medical advice. In that case the objection would perhaps have been well taken, that in forming an opinion as to her condition the witnesses should not be allowed to take into consideration her statements made at such examination. In such case the statements would be subject to a suspicion that they were made for the purpose of getting an opinion favorable to her. In the present case, the examination was not sought by her, and her statements were made in answer to interrogatories put by experts, who are supposed to be impartial, if not hostile, to her, and all her statements were made subject to a full cross-examination by the experts, so that there would be very little probability that they would be misled or influenced by any colored or false statements. We think the questions and answers were admissible, and that it was for the jury to say what

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weight should be given to the opinion under all the circumstances.

It is objected that the court erred in permitting the following question to be put and answered by one of the plaintiffs' witnesses, Dr. Beebe: "Might there not have been a fracture of the neck of the femur, and you not be able to discover it?" *Answer.* "That may be in the range of possibilities, but not probable; the usual organic changes and usual symptoms accompanying that fracture were not present."

This witness was one of the six who had made the personal examination of the plaintiff during the trial, and, although called by the plaintiff, had testified that in such examination he had discovered nothing in her physical condition which indicated that she was suffering pain from the alleged injury at the time. The witness, though necessarily called by the plaintiff, as one who had been selected by her to assist at the examination, did not testify very favorably to her; and it was in the discretion of the court whether a question in the nature of cross examination should be allowed to be put by the party calling him. It is not denied but that the question would have been a proper one to put to the witness on cross examination, had he been called by the defendant. The object of the question was, to show that an injury might exist, and did in fact exist, although there were no outward manifestations.

This exact question was before the supreme court of Massachusetts in the case of *Rowell v. City of Lowell*, 11 Gray, 420; and that court held that such a question was proper upon the cross examination of a surgeon testifying as an expert. In the present case, although the question was put upon direct examination, it was put to a witness who, although called by her, had not testified favorably; and there was no error, therefore, in permitting the question.

The point made that the plaintiffs were permitted to contradict one of their own witnesses, by way of impeachment, is hardly sustained by the record. The record shows that the

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witness referred to, Dr. Booth, was recalled by the defendant as its witness, for the purpose of contradicting a statement sworn to by the plaintiff *Quaife*; and that after he was examined by the defendant, the plaintiff cross examined him, and, without any objection on the part of the defendant, he testified as follows: "I did not tell *Quaife*, a day or two after the accident, that I jumped off the forward end of the car on the platform, and had *only just time* enough to get on as they started. I got off the rear end of the smoking car, and went to the other end, and saw my man, and got on at the forward end." The plaintiff *Mr. Quaife* was recalled, and on this subject stated, "that, a day or two after the accident, Dr. Booth stated to him that he got off the rear end of the smoking car, and jumped on to the forward end of the smoking car just as they were starting."

It will be seen, by an examination of the two statements, that they do not conflict in any material part. The record also shows that no objection was taken to the statement made by the witness *Quaife* on the ground that it was intended to impeach his own witness, but simply on the ground that the evidence was not rebutting.

The questions as to the nature and gravity of the injuries received by the plaintiff *Mrs. Quaife* were fairly and clearly submitted to the jury by the learned circuit judge. And, as a basis for assessing damages, they were told, in the strong language of the learned counsel for the defendant, that "although the jury might guess that some other injury might have been received by *Mrs. Quaife*, at the time in question, than is proved by the evidence, it is improper for the jury to do so. The jury are instructed not to do so, but to confine themselves to the consideration of such injuries, and only such injuries, as are proved by the evidence given in court to have been received by *Mrs. Quaife* at the time in question." If the evidence of the learned surgeons and physicians who made the examination of *Mrs. Quaife*, one of whom had

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attended her from the time of the accident, failed to convince the jury that her injuries were of a trifling character, and that she was feigning sickness and decrepitude for the purpose of enhancing her damages; and if the learned doctors, after making a thorough examination of her condition at the time of the trial, were unwilling to give it as their opinion upon oath that her injuries were slight and temporary in their nature, and that she was simulating lameness and disease — it would be presumptuous for this court to decide this issue of fact against the verdict of the jury, upon the evidence given in this case. It will hardly be expected that we can say, upon the evidence given on the trial, that the finding of the jury that her injuries were serious and permanent in their nature is unsupported by the facts proved; and, unless we can so say, the verdict must stand. The verdict is not excessive, except upon the theory that the evidence shows so clearly that the injuries were trifling and temporary, that the verdict of the jury to the contrary must be set aside as entirely unsupported. Most certainly the evidence does not show this. We are unable, therefore, to say, as a matter of law, that the damages assessed are excessive.

The case seems to have been fairly tried, and the judgment of the circuit court must be affirmed.

By the Court. — Judgment affirmed.

DREW, Administrator, vs. BALDWIN and another.

February 7 — February 24, 1880.

DEED. (1) *Conditions precedent or subsequent?*

EVIDENCE: (2) *Of a reentry as upon forfeiture.*

1. A deed of conveyance from parents to daughter, after the usual granting and *habendum* clauses, declares that the "conveyance is not to become *absolute* until the decease" of both grantors, and then only on this condition, that the grantee, her heirs, etc., shall cultivate the land in a good
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and farmer-like manner, and shall deliver to the grantors, or either of them, annually, during their or either of their natural lives, one-third of the annual product thereof. The consideration expressed in the deed is one dollar, and the "reservations and rents hereby reserved." *Held*, that the conditions named are conditions *subsequent*.

2. The grantee's father afterwards sold another farm, on which he resided, and with his family went to live on the land so conveyed, with the grantee and her husband; but does not appear to have then claimed that there had been any forfeiture. A year afterwards the grantee and her husband left the land, but returned nine years later, and lived with the father on said land for more than a year, and then again left; and the father had control of the land from the time when they first left it until his death. *Held*, that these facts are at least not conclusive of an agreement by which the deceased became possessed of the land and seized as of his first estate; and that, in ejectment by his administrator against the grantee and her husband, it was competent for defendants to show that while in possession he acknowledged their rights in the land, and did not claim it in his own right; and the grantee should have been allowed to testify, in her own behalf, for what reason she left the land.

APPEAL from the Circuit Court for *Sauk* County.

Ejectment, against *George Baldwin* and his wife, *Orissa Baldwin*, for forty acres of land alleged to have been the property of plaintiff's intestate, Noah H. Drew, at the time of his death, in 1873. The land had been inventoried as a part of the estate, and had been in the possession of the administrator until March 16, 1878, when defendants took peaceable possession. Defendants claim to own the land by virtue of a deed from said intestate to *Orissa Baldwin*. The terms of the deed, the evidence as to other material facts, and the findings of fact by the circuit court, will appear from the opinion.

Without determining whether the conditions of the deed were precedent or subsequent, the circuit court rendered judgment for the plaintiff; from which the defendants appealed.

For the appellants, there was a brief by *Vilas & Bryant*, and oral argument by *W. F. Vilas*.

J. W. Lusk, for the respondent.

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COLE, J. In the consideration of this case, it seems necessary to determine whether the conveyance from the plaintiff's intestate to the defendant *Mrs. Baldwin* was a grant upon what is termed in the law conditions precedent or subsequent.

It is claimed on the part of the plaintiff, that it was a grant upon conditions precedent, which were not performed by the defendants; consequently, that the title never passed, but remained in the grantor at his death. On the other hand, it is insisted that the deed conveyed the fee *in presenti*, which was liable to be defeated by a breach of conditions subsequent and entry by the grantor. The learned counsel on both sides agree that the intention of the grantor, as gathered from the whole instrument, is to control in the construction of the conveyance. The deed was executed and delivered on the 11th of September, 1854, and recites that Noah H. Drew and Lory Drew, his wife, of etc., "for and in consideration of one dollar to us paid, and the reservations and rents hereby reserved to be paid to us, or either of us, by our daughter *Orissa Baldwin*, wife of *George Baldwin*, . . . do hereby bargain, sell and convey unto the said *Orissa Baldwin* and to her heirs," etc., the land described. There is the usual *habendum* clause, with a covenant of warranty.

Then follows this condition or clause: "This conveyance is not to become absolute until the decease of us both, the said Noah H. Drew and the said Lory Drew, his wife, and then only on this condition, to wit: That the said *Orissa*, her heirs, executors, administrators or assigns, shall deliver to us and either of us, annually, during our or either of our natural lives, the one-third product of said 40 acres of land, annually produced and grown thereon, to be delivered to us, or either of us, at any place at which we may reside in said town; and shall farm and cultivate the same in a good and farmer-like manner. The one-third product, to be delivered as aforesaid, shall be one-third of each product raised or produced on the premises, and delivered at the time and in the

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condition usual in cases where land is let on shares; but small grain to be delivered threshed and cleaned, in half bushel; and corn, husked."

Now, although the question is not free from difficulty, yet we think it the better construction to hold this a grant upon condition subsequent. It will be observed that it is declared the conveyance shall not become *absolute* until the death of the grantors, and then only upon the performance of the conditions named. This language implies that an estate was intended to pass by the conveyance; if this were not so, it would seem inconsistent to state that the conveyance should not be absolute until these conditions were performed.

It is familiar law that a condition precedent is defined to be one which must take place before the estate can vest. Now the intention of the grantors seems to have been to vest an estate at once in the grantee, who was authorized to take possession of the land, cultivate it in a farmer-like manner, and deliver to the grantors, or the survivor, annually, one-third of the products raised thereon. In other words, the condition, from its nature, would seem to be one subsequent, which operated on the estate already created and vested, and rendered it liable to be defeated on failure to deliver the products or work the land in the manner specified.

It is a general principle, that conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates. 4 Kent., 129; *Horner v. C., M. & St. P. Railway Co.*, 38 Wis., 165; *Nicol v. The N. Y. & Erie Railway*, 12 N. Y., 121.

Assuming then, as we are inclined to do, that the title passed to the grantee by the conveyance, does the evidence show that it became revested in the grantor, either for the non-performance of the conditions annexed, or by mutual agreement of the parties? The learned circuit judge states, in his finding of facts, that from all the evidence he was fully convinced that sometime after the deceased returned to the farm,

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early in 1857, and previous to the time the defendants left, early in 1858, a mutual understanding had been arrived at between the parties, that the defendants would or should not perform the conditions of the deed, and that the deceased for that reason should and might retain possession, as he did, which was equivalent in law to entry for condition broken. Certainly, the evidence indisputably shows that the deceased, who had been living in Prairie du Sac, sold his place in the spring of 1857, and with his family went to live with the defendants on the land. But there is nothing whatever in the evidence to warrant the inference that the deceased, at this time, claimed there had been a forfeiture of the estate, and entered for a breach of condition. The two families continued to live upon the premises in the same house until March, 1858, when the defendants left the farm, and remained away until sometime in 1867, when they again returned, and lived with the deceased and his family for more than a year, and then again left.

It is clear that, from the spring of 1858, the deceased alone had control and management of this forty, with his other land, either working and cultivating it himself, or leasing it to others, until his death in December, 1873. From this continued possession of the property by the deceased, his control and management of it, together with the apparent abandonment of the farm by the defendants, the circuit court doubtless drew the inference that there must have been a mutual understanding or agreement that the defendants were not to perform the conditions of the deed, and that the deceased should retain possession, and become seized as of his first estate. Possibly such a presumption would naturally arise from these facts, unexplained; and yet it is obvious that the presumption would be destroyed by proof that the deceased acknowledged the rights of the defendants in the land, and did not claim it in his own right. There is surely some evidence which would tend to show that the deceased acknowledged some such right of the

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defendants as late as 1869. The witness Dennett says that, in a conversation which he had with the deceased at about that time, the deceased said "that *George* had to have something off from the farm; something was going to *George*, and he generally let him have a hog or something in the fall when he killed his hogs."

It would be improper for us to express any opinion upon the credit which should be given to this testimony. We only refer to it to show that much depends upon the intention of the parties; on the one hand in giving up, and on the other in holding possession and controlling the property. The acts of the parties are equivocal in their character, and do not necessarily indicate an intention on the part of the grantor to reclaim the estate, or on the part of the defendants to finally abandon it. It is certain that the deceased did not originally take possession because there had been a forfeiture of the estate. Whether the possession previously commenced was held by him after 1858 in his own right, exclusive of all claim of the defendants, is a fact to our minds not satisfactorily established. And as bearing upon this point and serving to show the understanding of the parties at the time, it seems to us that *Mrs. Baldwin* should have been permitted to state the reason why she left the farm and went to live in town. This question was asked her, and excluded by the court on plaintiff's objection. The answer might, perhaps, have thrown some light on the question whether, at that time, the understanding was that the defendants should not perform the conditions of the deed, but entirely abandoned the place, or whether the deceased waived the performance on their part, and entered into some arrangement or agreement by which he was to control and manage the property himself for a time, receiving the products, until they should return and take possession. For the error, therefore, in excluding this testimony, we are inclined to think there should be a new trial. Further investigation may serve more clearly to show the real rights of the parties.

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By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

BLUMER and another vs. THE PHOENIX INSURANCE COMPANY
OF BROOKLYN.

February 9—February 24, 1880.

48	535
74	473
48	535
101	418
48	535
107	469

FIRE INSURANCE. *What answers in application a continuing warranty.*

1. The views of this court expressed in the opinion upon the former hearing of this cause (45 Wis., 622), adhered to.
2. To the questions in a form of application for insurance, prepared by the insurer, "Is there a watchman in the mill during the night? Is the mill ever left alone?" the applicant answered, "No regular watchman, but one or two hands sleep in the mill." *Held*, that the answer was responsive to the questions, and a continuing warranty.

[TAYLOR, J., dissents, holding that the court should in no case treat such an answer as a continuing warranty, unless it can determine as matter of law that the continuance of the custom stated would lessen the risk; and that the court could not so determine in respect to the answer here in question.]

APPEAL from the Circuit Court for *La Crosse* County.

After the former decision in this cause, reported in 45 Wis., 622–660, a rehearing was granted. On such rehearing, a brief was filed for the plaintiffs signed by *M. P. Wing* and *G. C. Prentiss*, as attorneys, with *S. U. Pinney* and *P. L. Spooner*, of counsel, and there was oral argument by Messrs. *Spooner*, *Pinney* and *Wing*. For the defendant, there was a brief by *Cameron, Losey & Bunn*, its attorneys, and a separate brief by *Jenkins, Elliott & Winkler* and *D. S. Wegg*, of counsel, and oral argument by *M^r. Wegg*.

ORTON, J. The opinion of the court upon the first hearing of this cause (45 Wis., 622), expressed at the time, and still

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expresses, the views of this court upon all of the questions considered therein. The reargument has not weakened that opinion, and, we think, has tended strongly to confirm it.

The leading question is a very narrow one, and rests upon the logical relation and commonly accepted meaning of the question and answer upon which the verdict was ordered for the defendant, viz.: "Is there a watchman in the mill during the night? Is the mill ever left alone?" The first part of this question is, in itself, literally incomplete, and insufficient to express the inquiry whether a watchman is *constantly kept* in the mill during the night; for it is, whether *at any time* during the night there is a watchman in the mill. The other part of the question, "Is the mill *ever* left alone?" supplies this literal deficiency; and both parts together express the full inquiry, whether there is a watchman in the mill *all the time* during the night. This meaning is intensified by the language "is the mill *ever* left alone?" This meaning of the question is so obvious as to scarcely bear discussion. Its purpose most clearly was to ascertain whether any person was kept in the mill in charge of it and to watch it during the night, as a precaution against fire. The question most naturally and logically suggests such an answer as would satisfy the object and purpose of the inquiry; and we think such an answer was made. "No *regular* watchman, but one or two hands sleep in the mill," — that is, one or two hands are *constantly* in the mill, for they sleep there during the night, and *they* act as watchmen.

This answer satisfies the inquiry in every particular, and is directly responsive to the question. Without the last part of the answer, it is very clear that the first part would not be responsive to the first part of the question, "Is there a watchman in the mill?" "No *regular* watchman." The insured is not asked whether there is a *regular* watchman in the mill, and therefore this part of the answer is not responsive.

The question is, whether there is a watchman of any kind

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in the mill during the night, or, is the mill *ever* left alone? The answer is directly responsive to the whole question, and its obvious meaning is, "Yes, there is a watchman in the mill during the night, for one or two men sleep in the mill who act as such, and therefore the mill is *never* left alone."

It is conceded by the learned counsel of the appellants, that, if the answer was responsive to the question, then both the question and the answer were material to the risk, and constituted a warranty that would continue during the life of the policy, as a matter of law; and such is unquestionably the law. "The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not, therefore, open to be tried by the jury." May on Ins., § 185.

The learned counsel for the appellants, in speaking of this rule, says in his brief, and very correctly: "The essence of this rule is an implied assent of the insured to the insurer's view as to what is material to the risk. The question must, therefore, indicate clearly what the insurer does deem material."

Tested by this rule, can there be any doubt that the insurer intended this inquiry to be material, and that the insured assented to this view? This being our opinion of the materiality of both the question and answer, and that the language is not susceptible of any other construction, or indeed liable to any doubtful or uncertain construction, the positions assumed by the learned counsel, and their very able arguments, and the numerous authorities cited by them in their support, upon any other premises or hypothesis, are inapplicable and need not be considered.

This opinion, upon this important question, might be greatly extended, and perhaps ought to be, if for no other reason, to show proper deference to the distinguished counsel, and their very able and exhaustive treatment of the subject on the argument; but the former opinion of the court by Mr. Justice

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LYON is so full, fair and satisfactory, that anything further would be a mere repetition and supererogation.

The only other question which need be considered, is that of a waiver by the company of the conditions and warranties of the policy. This question was not deemed of sufficient importance, or as raised on sufficient evidence, to command attention at the trial, or on the former argument; and we are now unable to find in the testimony any such acts of waiver by the company, after knowledge of the facts of forfeiture, as bring the case within the authorities on this question. *Miner v. Phoenix Ins. Co.*, 27 Wis., 693; *Webster v. Phoenix Ins. Co.*, 36 Wis., 167; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis., 108; *Northwestern Ins. Co. v. Germania Ins. Co.*, 40 Wis., 446.

The judgment of the circuit court must be affirmed, with costs.

TAYLOR, J. I dissent from the opinion of the court in this case, for the reasons stated in my dissenting opinion filed upon the former argument of this case.

In that opinion I stated what I then thought, and still think, is the true rule for the determination of cases of this kind, as follows: "None of the cases go further than this, that where a question, in an application for insurance, relates to the manner of using a mill or other manufacturing establishment upon which insurance is sought, or to the precautions taken against fire, and the answer is affirmative or negative, if the court can determine from the question and answer, as a matter of law, that the continuance of the custom or use, as the answer states it to be, will lessen the risk, such answer will generally be held to be a continuing warranty; but when the custom or use is such that the court cannot say, as a matter of law, that its continuance will necessarily lessen the risk, it will not be held to be a continuing warranty unless it be expressly so agreed in the contract." After a very careful

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examination of the authorities, I am satisfied that the rule above stated is supported by an overwhelming weight of authority, and is fully sustained by the fundamental rules of construction applicable to contracts of this nature.

That this court cannot say, as a matter of law, that the fact that "one or two hands slept in the mill" did in fact lessen the risk, was clearly demonstrated by the learned counsel for the appellants upon the argument, and I do not understand that a majority of the members of this court hold otherwise. It is not denied that, in this case, the question whether there was a continuing warranty, is dependent upon the construction which shall be given to the language used. Clearly the language itself does not necessarily imply that there was a continuing warranty that the hands should sleep in the mill during the running of the policy. The language used is certainly as susceptible of a meaning which limits it to the present and past *status* of things as to the future; and to extend it to the future depends upon construction; and the intention of the parties to be derived from all the circumstances attending the making of the contract, as well as the nature of the contract itself, ought to control such construction. If it cannot be said, as a matter of law, that the continuance of the custom would be beneficial to the insurance company, how can we infer that it was the intention of the parties that it should extend to the future? If we cannot say, as a matter of law, that the insurance company would be benefited by the continuance of the custom, there certainly does not arise any presumption, from the nature of the custom itself, that the company intended it should be so continued.

If the answer had been that "no watch was kept," would there have been any presumption that the insurance company intended to bind the assured to continue the custom of not having a watch during the continuance of the policy? Such presumption would be little less than an absurdity. So in any case where the court cannot, as a matter of law, say that

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the custom is beneficial, and it remains an open question as to whether it is beneficial or prejudicial, there is certainly no reason for holding that it was intended the custom should continue. If the custom is neither beneficial nor prejudicial to the insurance company, why should it be construed to be a warranty that it shall continue? The only result of so holding is, that the insurer may, upon a doubtful construction of the contract, import into it a warranty as to a wholly immaterial matter, the breach of which, on the part of the insured, shall forfeit the policy. Contracts are not thus liberally construed for the purpose of importing into them conditions subsequent, for the mere purpose of creating forfeitures by their breach, without showing any damage arising from such breach.

Justice LYON, in his opinion on the first hearing of this case, undoubtedly felt the force of this position, and, in order to strengthen the opinion upon the main question, stated it as his opinion that, as a matter of law, the continuance of the custom was material to and lessened the risk. With great deference to the judgment of the learned justice, I think the question whether it was material to the risk is not a question of law for the court, but one of fact for the jury; nor is it a question upon which one not an expert in the insurance business would be permitted to give an opinion as a witness upon the issue as to whether it was or was not material to the risk. That there is nothing in the form of the questions in the application, nor in the answer, from which the court can say that it was made material by the parties by the contract itself, is, I think, fully shown in my former opinion.

I am unable to add anything further to the argument made in my opinion filed on the first argument of the case, against the views held by the majority of the court, and will only add the following case to those heretofore cited, lately decided by the supreme court of Pennsylvania: *Knecht v. Life Ins. Co.*, Albany Law Journal, January 31, 1880, p. 192, which I think tends to support my views of this case.

The Town of Sherwood Forest vs. Benedict and others.

I think the learned circuit judge erred in directing a verdict for the defendant, and that the judgment of the circuit court ought to be reversed.

By the Court. — Judgment affirmed, with costs.

THE TOWN OF SHERWOOD FOREST vs. BENEDICT and others.

48	541
76	589

February 10 — February 24, 1880.

OFFICIAL BOND. *Presumption that officer has done his duty.*

In an action upon the official bond of an overseer of highways, proof that he had not rendered to the town supervisors, "on or before the third Monday of March" in the proper year, a verified account in writing, of the character prescribed by sec. 60, ch. 19, Tay. Stats., would show a breach of the bond; but upon mere proof that he did not render such account on said third Monday, the *presumption* would still be that he had rendered it *before* that date.

APPEAL from the Circuit Court for *Clark County*.

Action on the official bond of the defendant *Benedict* as overseer of highways. Upon a special verdict, both parties moved for judgment. The material facts in regard to the verdict are stated in the opinion. Judgment was rendered for the plaintiff; and defendants appealed.

The cause was submitted on the brief of *Ring & Youmans* and *J. M. Morrow* for the appellants, and that of *James O'Neill* for the respondent.

COLE, J. The bond sued on in this case was conditioned for the faithful discharge by the defendant *Benedict* of the duties of the office of overseer of highways for road district No. 1 of the town, and for the proper application and payment of all moneys which should come into his hands as such overseer by virtue of said office, as prescribed by section 25, ch. 19, Tay. Stats. Most certainly one duty imposed upon him as overseer was to render to the supervisors of the town,

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on or before the third Monday of March, 1876, an account in writing, verified by affidavit, which should contain the matters specified in section 60 of the same chapter. A failure to render that account would indubitably be a violation of official duty, and amount to a technical breach, at least, of the bond. In the special verdict, the jury found that the defendant *Benedict* did not, on or before the third Monday of March, 1876, nor at any time since then, render to the supervisors this account; and this is the only fact found upon which any default upon his part can be predicated.

Now, after a careful examination of the testimony, we think this finding is entirely unsupported by the evidence. There is ample testimony tending to prove that *Benedict* did not render that account on the third Monday of March, 1876, but nothing whatever to repel the presumption or inference that he had rendered it before that time. Surely, in the absence of all proof upon the point, we cannot presume that he was guilty of a violation of official duty. It is argued in the brief of the learned counsel for the town, that it was conceded at the trial that *Benedict* had never rendered this account; but there is no such concession in the record. On the contrary, one ground relied on in this court for a reversal of the judgment is, that no testimony was offered on the part of the town from which the jury was authorized to find that *Benedict* did not, before the third Monday of March, 1876, render his account to the supervisors, according to law. The burden was upon the town of establishing that fact, and of showing that this account had never been rendered, in order to prove even a technical breach of the bond. For it will be borne in mind that the jury further found that *Benedict* had laid out and expended on the highways in his town all the moneys which he had received as overseer, so that there was no unexpended balance in his hands to pay over to the town treasurer; thus negating the principal cause of action set forth in the complaint. But judgment was entered for the plaintiff for

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nominal damages and costs, because there had been a technical breach of the bond by reason of the failure to render the proper account. But as it does not appear that this account was not rendered before the third Monday of March, 1876 — there being a total absence of proof upon that point,— it is impossible to sustain the judgment even on the ground upon which it was placed. There must, therefore, be a new trial.

It is said that the court below improperly admitted evidence as to the value of the work done by *Benedict* upon the road. But the learned judge said in his charge that this evidence was only important as bearing upon the question whether *Benedict* really did the amount of labor which he claimed to have performed, and that no other effect could be given to it; that he was not limited, in the credit which he should receive, to the actual value of the labor as other people might estimate it, but was entitled to pay at the rate of compensation per diem which the statute allowed. With this restriction as to the effect of the evidence, we are inclined to think there was no error in admitting it for the purpose indicated. But because the verdict is entirely unsustained by evidence upon the question whether the account was not rendered before the third Monday of March, 1876, we must reverse the judgment and order a new trial.

By the Court.—Judgment reversed, and new trial awarded.

WELP VS. GUNTHER and wife.

February 10—February 24, 1880.

FORECLOSURE OF LAND MORTGAGE. (1) *What statute governs the judgment.* (2) *Form of judgment under present statute.* (3) *Purchaser's right to the possession.*

1. Judgment in foreclosure must conform to the statute then in force regu-

48	543
78	550
48	543
91	65
48	543
103	189
103	190
104	38

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lating the practice, or it will be reversed, at least where it does not clearly appear that the appellant will suffer no prejudice from the want of such conformity.

2. Under the existing statutes of this state, personal judgment against the mortgagor for the whole amount of the mortgage debt, or even for the deficiency after a sale of the mortgaged property, cannot be rendered with the judgment of foreclosure; though that judgment may include an order (if demanded in the complaint) that a judgment for the deficiency be entered after such deficiency shall have been duly ascertained; and this can be done only after the sale is made *and confirmed*; and a judgment in violation of this rule must be reversed.
3. The statutory provision (sec. 3169, R. S.) that the purchaser at foreclosure sale shall be let into possession on production of the sheriff's deed, must be construed as defining the rights of such purchaser *after confirmation of the sale*. *Wächler v. Endler*, 46 Wis., 301.

APPEAL from the Circuit Court for *Grant* County.

The defendants appealed from a judgment in plaintiff's favor. The case is stated in the opinion.

The cause was submitted on the brief of *Barber & Clementson* for the appellants, and that of *A. W. Bell* for the respondent.

TAYLOR, J. This is an appeal from a judgment in an action to foreclose a mortgage. The judgment was entered after the R. S. 1878 took effect.

The errors relied on by the appellants for the reversal of this judgment appear in the judgment itself. The first is, that a personal judgment is rendered in favor of the plaintiff against *Joseph Gunther*, who is personally liable for the debt secured by the mortgage, for the whole amount of such debt. The second, that the judgment provides that after the sale is made, if the sum realized thereby shall be insufficient to pay the debt and costs, the sheriff shall certify such deficiency in his report of sale, and that upon filing such report the clerk of the circuit court shall credit the amount realized from such sale, after deducting the costs of sale, upon the personal judgment, and that the plaintiff have execution for the balance

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unpaid; and the third, that the judgment directs that the purchaser at such sale be let into possession of the premises sold, on the production of the sheriff's deed or a duly authenticated copy thereof.

The action was commenced before the R. S. 1878 took effect, and the plaintiff's attorney had the judgment entered in strict conformity to chapter 143, Laws of 1877, which was in force at the time the action was commenced. See sections 1, 2 and 7 of said chapter 143. But the judgment was not entered until the R. S. 1878 took effect, and until after said chapter 143 had been repealed. It is admitted that under the provisions of section 4980, R. S. 1878, the judgment should have been entered in the form prescribed by sections 3162 and 3169 of said statutes, so far as relates to the matters above mentioned; but it is insisted by the learned counsel for the respondent, that the irregularities complained of can work no injury to the appellants, and that this court should not reverse the judgment for that reason.

The power to render a personal judgment against the person liable for the debt secured by the mortgage, in an action to foreclose such mortgage, given by section 1, chapter 143, Laws of 1877, was taken away by section 3162, R. S. 1878, which provides that the judgment shall fix the amount of the mortgage debt due or to become due, and when demanded in the complaint the judgment shall contain an order directing that judgment be rendered for any deficiency against the parties personally liable therefor.

It is urged that the personal judgment rendered in the judgment appealed from can work no injury to the appellants, for the reason that, taking the whole judgment together, it is apparent that no execution could be issued against the defendants for the collection of the same until after a sale of the mortgaged premises and the application of the proceeds of such sale to the payment of such judgment, and that then execution can only issue for the balance remaining unpaid

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after such application. This would undoubtedly be the construction which should be given to the judgment. Yet it is not clear that, if this judgment is to stand, it might not be docketed as a judgment against the defendant against whom it is rendered, so as to make it a lien upon his other real estate not covered by the mortgage.

Section 7, ch. 143, Laws of 1877, which declared that such a judgment should not be a lien upon real estate until after the sale of the mortgaged premises, having been repealed before this judgment was rendered, it might have been docketed under the provisions of section 2899, R. S. 1878, and under section 2902 have become a lien upon all the real estate of the defendant, to the great prejudice of the defendant. But, however this may be, the direction in the judgment that after the sale and filing of the report the clerk shall issue execution for the balance due upon the judgment after applying the proceeds of the sale to the extinguishment thereof, without any further act, and without waiting for a confirmation of the sale, is clearly erroneous.

Section 3162, R. S. 1878, above quoted, directs that the judgment of foreclosure shall, when demanded in the complaint, contain "an order directing that judgment be rendered for any deficiency against the parties personally liable therefor." This is the only provision of any kind in the present statute which authorizes a judgment for the deficiency; and this court has held that, under a law similar to this, this "judgment," or, as the court say, order after judgment, must be entered after the sale and confirmation thereof.

This case falls within the decision of this court in *Tormey v. Gerhart*, 41 Wis., 54. In that case the judgment provided "that if the proceeds of such sale should be insufficient to pay the amount due the plaintiff, the sheriff should specify the amount of such deficiency in his report of sale, and the defendants John Gerhart and John Kirk should pay the same." This the court held to be a judgment for the deficiency

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rendered before sale, and erroneous under section 3, ch. 243, Laws of 1862, which provided that in all actions for foreclosure, "the court may, on motion of the plaintiff therein, in case the moneys arising from the sale of the mortgaged premises shall be insufficient to pay the amount due the plaintiff for principal and interest, costs and expenses of sale, enter or render a judgment against the defendants who executed the note or other evidence of debt accompanying the mortgage, for the amount of such deficiency, at the time of the confirmation of the report of sale or at any time thereafter." Justice COLE, in delivering the opinion in that case, says, in referring to the clause above quoted: "It is clearly a judgment for a deficiency, . . . and cannot be regarded as a direction to the effect that, upon confirmation of the report of sale, an order might be entered that the makers of the notes pay the deficiency, and for an execution, etc. Such clause or direction in a final judgment of foreclosure might be proper enough. . . . But this is a judgment for the deficiency, and, notwithstanding the ingenious argument of counsel for plaintiff, who contends for a different construction, the law of 1862 appears clearly to provide that the court shall not enter an order for the payment of the deficiency until the confirmation of the report of sale."

In the present case, there was a judgment, not only for the deficiency, but for the whole amount of the debt secured, in the judgment of foreclosure, with a proviso, perhaps, that execution should not issue until the amount realized from the sale of the mortgaged premises had been applied to its payment, and then only for the deficiency. The present statute, although not as full and specific as the law of 1862 as to the time when the judgment for the deficiency should be entered, is sufficiently so to show very clearly that the legislature did not intend that any personal "judgment," or, as the court says in the case above quoted, "order" directing the payment

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thereof, should be entered until after the report of sale has been confirmed.

The language is: "When demanded in the complaint, the judgment of foreclosure shall contain an *order* directing that judgment be rendered for any deficiency against the persons liable therefor." This language clearly negatives the inference that the judgment for the deficiency shall be contained in the judgment of foreclosure; but the judgment of foreclosure shall contain an order directing a future judgment or order against the parties liable therefor, for any deficiency which shall remain after the proceeds of the sale are properly applied to the payment of the mortgage debt; and it is evident that this order to pay the deficiency cannot be entered until it be first ascertained that a deficiency exists, and its legal existence can be determined only by the confirmation of the sale.

The other objection, that the judgment directs that the purchaser be let into possession upon production of his deed, or a certified copy thereof, follows the language of the present section 3169, R. S. 1878; but as the same section provides that the title shall not vest in the purchaser until after confirmation of sale, and as this court has lately held that such purchaser does not obtain a right of possession until after such confirmation (*Wahler v. Endter*, 46 Wis., 301), it is clear that section must be construed to mean that the purchaser shall be let into possession after confirmation of the sale, upon the production of his deed or a duly certified copy thereof.

This court has repeatedly held that, in an action to foreclose a mortgage, the judgment must conform to the statute regulating the practice in such actions, and that, unless it does so conform, it must be reversed upon appeal. *Jones v. Gilman*, 14 Wis., 450; *Van Norstrand v. Mansfield*, 16 Wis., 224; *Carberry v. Benson*, 18 Wis., 489; *Briggs v. Seymour*, 17 Wis., 255.

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We are unable to say that the irregularities complained of do not prejudice the rights of the mortgagor. The docketing of the judgment as a personal judgment for the whole sum secured by the mortgage would create an apparent lien upon all his real estate for the full amount of such judgment; or, if not for the full amount, for such amount as should be left unpaid after sale and the application of the proceeds thereof; when under the existing law it is clear that it is not intended that a judgment of foreclosure should be a lien upon any lands except those mortgaged, until after the sale and confirmation, and then only for any deficiency which shall be adjudged due the plaintiff upon motion for an order directing the payment thereof by the party liable therefor. Nor can we say that the appellants are not prejudiced by the order authorizing execution to issue for a deficiency before confirmation of the sale, and without notice to the appellants or any adjudication of the court as to the amount of such deficiency.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in accordance with this opinion.

THE STATE OF WISCONSIN ex rel. THE GREEN BAY & MINNESOTA RAILROAD COMPANY vs. JENNINGS and another.

February 10—February 24, 1880.

MANDAMUS: ISSUE OF TOWN BONDS IN AID OF RAILWAY. (1) *Statute of limitations.* (2) *Laches in demanding bonds.* (3) *Presumption as to legislative action.* (4) *Discretion of town officers: statute construed.* CONTRACTS: TOWNS. (5) *Covenant of town not to sell railway stock.*

1. Whether the statute of limitations is applicable directly, or will be applied by way of analogy, to a proceeding by *mandamus*, is not here decided.
2. Where a *mandamus* to compel the issue of town bonds to a railway company in exchange for its stock, was not asked for until nearly six years after the relator's right accrued: *Held*, that, in exercising the *discretion*

48	549
90	81
96	84
96	493
48	549
99	15

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- of the court in reference to the writ, the delay would not be treated as *laches*, in the absence of any evidence that the town was injured thereby, especially as the contract was mutual, and it had been, at all times since the relator's road was built, in the power of the town to enforce an exchange of its bonds for stock of the company.
3. There is no *presumption* that, if the relator had compelled a delivery of the bonds before a certain act was passed incorporating a city which includes part of the territory of the defendant town, the legislature would have required such city to pay part of the bonded debt of the town—even if it had power to do so.
 4. Ch. 93 of 1867 (under which the contract was made) did not confer upon the town officers any discretion as to issuing the bonds *after* a submission by them of the relator's proposition to a vote of the electors, and an acceptance thereof by such vote; but the agreement spoken of in the act, between such officers and the railroad company, was *preliminary* to the submission, and, when made, was a *contract* between the town and company, with an affirmative vote of the town as a condition precedent.
 5. There is nothing in said ch. 93 which requires the town to sell its stock; and its contract to retain the same until the relator consents to a transfer thereof, is valid.

APPEAL from the Circuit Court for *Waupaca* County.

This is an appeal by the defendants from an order overruling a demurrer to the relation, and a motion to quash an alternative writ of *mandamus* commanding the defendants to execute and issue to the relator the bonds of the town of Mukwa (of which town they are the chairman of the board of supervisors and town clerk respectively) in exchange for the stock of the relator, pursuant to a vote of the electors of said town. The motion to quash the alternative writ is founded exclusively upon alleged defects in the relation, and presents the same questions presented by the demurrer thereto. It is alleged in the relation that the relator was organized by the name of "The Green Bay & Lake Pepin Railway Company," by virtue of chapter 540, P. & L. Laws of 1866; that in 1873 its name was duly changed to "*The Green Bay & Minnesota Railroad Company*;" and that before the seventh day of August, 1868, the relator made and delivered to the town clerk of said town of Mukwa a definite proposition in writ-

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ing, duly executed, that said town deliver to the relator its bonds for \$100 each, to the amount of \$35,000, payable to the treasurer of the relator, in exchange for 350 shares of its capital stock—one-half of said bonds to be payable in ten years and the other half in fifteen years from delivery, and all of them to have eight per cent. interest coupons attached, payable at a certain bank in the city of New York. The proposition further provided that the relator should be entitled to delivery of the bonds whenever the railway of the relator should be “graded and ironed from Green Bay to the town line of said town of Mukwa, and within one-half mile of Wolf river, in the village of New London;” also that the stock to be issued therefor “shall not be negotiable or transferable to other parties, unless by special agreement with and consent of” the relator.

The relation alleges further, that, immediately after receiving such proposition, the town clerk called a meeting of the board of supervisors of the town to consider the same, which meeting was held; and that at such meeting it was deemed expedient to publish notice of a meeting of the voters of the town to vote upon such proposition. Facts are alleged showing that such meeting was duly and regularly called and held; that a vote was taken upon the proposition and duly canvassed; that such vote was in favor of the proposition; and that the statement thereof required by the statute was duly made, signed and filed, from which it appears that a majority of the legal voters of the town who voted thereon, voted “for the railway proposition.” The grading and ironing of the relator’s railway between the points mentioned in the proposition, on or before December 19, 1871; the construction thereof through the town of Mukwa in the following year, and its operation ever since; the tender of a stock certificate by the relator to the chairman of the board of supervisors and town clerk of that town, for 350 shares of the capital stock, and a demand that those officers execute and deliver to it the

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bonds specified in the proposition, made March 3, 1872, and again December 6, 1877; and the refusal of those officers on both occasions to comply with such demand—are alleged in the relation.

The alternative writ of *mandamus* was issued December 15, 1877. Special grounds of demurrer to the relation are assigned as follows: "*First.* The vote mentioned in the petition of the relators is void, such vote requiring the principal and interest of the bonds to be paid at a bank in New York city, when by law the town can only pay its obligations at the treasury of said town. *Second.* The application by the relators to said board of supervisors to subscribe the stock and issue the bonds in pursuance of the vote set forth in the petition of the relators, not having been made for more than six years after the vote was taken, is a waiver and abandonment of the right of the relators under said vote, and said application now comes too late. *Third.* It is a matter of discretion with said board of supervisors, whether they will issue the bonds and make the subscription in pursuance of the vote. *Fourth.* The vote mentioned and set forth in the petition of relators is void, because it does not comply with the act under which the vote was taken. *Fifth.* It does not appear by the petition of the relators that there was any legal meeting of the board of supervisors of said town for the purpose of submitting the proposition of the railroad company to a vote of the people."

For the appellants, there was a brief by *Myron Reed* and *E. L. Browne*, and oral argument by *S. U. Pinney*.

For the respondent, there was a brief by *Theo. G. Case*, as attorney, with *Hastings & Greene*, of counsel, and oral argument by *Mr. Hastings*.

LYON, J. The validity of chapter 93, P. & L. Laws of 1867, under which the proceedings set out in the relation were taken, was adjudicated by this court in *Oleson v. The Green Bay*

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& *Lake Pepin Railway Co.*, 36 Wis., 383; and in *Bound v. The Wisconsin Cent. Railroad Co.*, 45 Wis., 543, the principle of that adjudication was reaffirmed. Indeed, the learned counsel for the defendants freely concede the validity of the act. Hence, the question to be determined is, Does the relation state facts sufficient to show that the relator is entitled to a writ of *mandamus* as prayed? A ground of demurrer was assigned *ore tenus* in the argument, which will first be noticed. It is claimed that the relator is not entitled to relief by *mandamus* because of its long delay in applying for the writ. The relator's right to a delivery of the bonds voted by the town of Mukwa (if it has such right) did not accrue until March, 1872, when the same were first demanded; and this proceeding was instituted within less than six years thereafter. The statute of limitations, therefore, whether it is directly applicable to such a proceeding, or whether it be applied to it by analogy, as in the case of prescriptions by adverse user (*Rooker v. Perkins*, 14 Wis., 79), is not a bar to the proceeding.

It may be conceded, however, that the court has some discretion in the matter of granting or refusing the writ, and that it will not be granted if the relator has delayed unreasonably, to the prejudice of the defendant, to apply for it.

In this case there was a delay of nearly six years, which is not explained or excused; and if it appeared that the town of Mukwa would be more seriously injured by being compelled to issue the bonds now than it would have been had it been compelled to do so earlier, we might hesitate to say that a *mandamus* ought to issue. The only fact of which we can properly take notice affecting this question of increased injury, is, that by chapter 362, P. & L. Laws of 1869, and chapter 485, P. & L. Laws of 1870, the legislature detached certain territory from the town of Mukwa and included the same in the village of New London, without providing that the village should be liable for a proportionate share of the indebtedness of the town which might accrue should the relator thereafter

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earn the bonds in question. It is a sufficient answer to the argument founded on this fact, to say, that since the bonds were earned and demanded it does not appear that any territory has been taken from the town, or that anything has occurred to impair its ability to perform its contract with the relator. But, if it did so appear, the fact remains that it was in the power of the town to issue its bonds at any time after the relator had complied with the contract on its part, and compel the relator to accept them in exchange for the stipulated amount of its capital stock. The contract was mutually binding upon both parties. *Bound v. Wis. Cent. Railroad Co.*, 45 Wis., 543, and cases cited. This fact is not without significance. If there has been laches, the relator is not alone the guilty party.

Reference has been made to chapter 132 of 1877, incorporating the city of New London, containing the territory formerly included in the village. Counsel say that had the relator proceeded diligently and compelled a delivery of the bonds before that act was passed, presumably the legislature would have inserted a provision requiring the city to pay a part of the bonded debt of Mukwa. We think there is no such presumption. Besides, had such a provision been inserted in the city charter, it is a very grave question whether it could be sustained.

We are entirely unable to say, from the record before us, that the delay of the relator in commencing this proceeding has in any manner prejudiced the town, and we conclude that such delay is not of itself sufficient ground for denying the relief sought.

If the relator is entitled to the delivery of the bonds, *mandamus* to the town officers who are charged by law with the duty of executing and delivering them, requiring them to do so, is the proper remedy. Of this there is no room for question or doubt.

The specific grounds of demurrer assigned seem to cover

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every other possible objection to the sufficiency of the relation; and these will be briefly considered in their order, without reference to their relative importance:

1. The fact that the proposition of the relator, which was accepted by the town of Mukwa, required the interest coupons (and perhaps the principal of the bonds) to be paid at a bank in the city of New York, does not, we think, invalidate the contract. We are aware of no constitutional or statutory principle or provision which was violated by that stipulation. Certainly there is nothing in chapter 93 of 1867 which prohibits it. If authorities are necessary to support the stipulation, they may be found cited in the brief of counsel for the relator.¹ But this objection is not pressed by counsel for the defendants.

2. All has been said, in considering the question of laches, that it is deemed necessary to say concerning the effect of the statute of limitations. If the statute is applicable to the case, it is clear that it did not commence to run when the town voted to issue its bonds, but when the demand for the bonds was made, which was less than six years before this proceeding was commenced.

3. It is claimed that chapter 93 of 1867 gave the town board of supervisors a discretion to issue the bonds or to refuse to issue them, after the town voted to accept the proposition of the relator. This position is founded upon a clause in section 1 which provides that the town may issue its bonds "in such manner as may be agreed upon by and between the directors of said railway company and the proper officers" of the town, as thereafter provided. Section 2 confers upon the town board of supervisors power to submit any proposition of the railway company to a vote of the electors of the town, or to refuse to do so, in the discretion of

¹ The cases cited to this point in the brief for the relator were *E., I. & C. R. R. Co. v. Evansville*, 15 Ind., 395; *Meyer v. City of Muscatine*, 1 Wall., 391; and *Lynde v. The County*, 16 id., 7-13. — REP.

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the board. The meeting of the board is called "to take into consideration the proposition of said company," and the board shall publish a notice of election, "*if deemed expedient.*" The board may dictate the terms of the proposition by refusing to submit it to the electors unless it conforms to the views of the board, and the company is powerless to compel a submission.

When the terms of the proposition are settled and agreed upon by the board of supervisors and the company, the contract is made between the town and the company; but it is a contract upon condition precedent, and inoperative until the condition is performed. That condition is a vote of the electors duly taken in favor of the proposition. The electors cannot change the contract. They can only affirm or disaffirm it. If they affirm it, the contract becomes operative and binding upon both parties. If they disaffirm it, neither is bound. It is very clear that this preliminary contract, or contract upon condition precedent, is referred to in section 1, and not a contract to be made, ratified or controlled by the board after an affirmative vote of the electors on the proposition. If possible, this is made more clear by section 4, which provides, without qualification or reservation, that if the vote on the proposition be affirmative, it shall be the duty of the proper officers (and in this case these defendants are the proper officers), upon receiving the stock in conformity with the proposition, to issue and deliver to the railway company the bonds called for by such proposition. The contract is made by the proper town officers and the railway company. The condition precedent, upon which its efficacy as a contract depends, is performed by the affirmative vote of the electors; and nothing remains but for the chairman of the board of supervisors and town clerk of the town, upon tender of the specified railway stock, to receive it, and issue and deliver the bonds according to the contract. This duty is purely ministerial, and *mandamus* is the appropriate process to compel performance of it, if performance is refused.

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We find nothing in any of the cases cited in opposition to the above construction of chapter 93 of 1867. Those cases are decided upon statutes differing essentially in principle from chapter 93, and are not applicable here. We conclude that when the relator tendered the stock to the defendants, and demanded the bonds specified in the proposition, there was a valid contract between the town and the relator for the issue of the bonds, and the defendants were absolutely required by the statute to comply with such demand.

4. The next objection to the sufficiency of the relation is, that it appears on its face that the terms of the contract do not comply with chapter 93 of 1867. The point of the objection is, that the restriction in the contract upon the negotiation by the town of the railway stock received for its bonds invalidates the contract. There is nothing in chapter 93 which compels the town to sell its stock. It may hold the same as long as it chooses to do so. And if it may hold it at will, no good reason is perceived why it may not contract to hold it until the relator consents to its transfer. We think the objection is not well taken.

5. Lastly, the objection that the relation fails to show a legal meeting of the board of supervisors for the purpose of submitting the proposition to the electors of the town, is not sustained by the relation itself. That instrument alleges a meeting of the board for that purpose, and presumably it was a *legal* meeting.

By the Court. — The order of the circuit court is affirmed.

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January 9—March 9, 1880.

TAX PROCEEDINGS: TAX DEED. (1) *Form of tax deed.* (2) *Presumption from deed as to date of sale.* (3) *When affidavit of a majority of assessors sufficient.* (4) *Affidavit construed.* (5-8) *Evidence as to rule of assessment.*

1. A tax deed executed under Tay. Stats., p. 437, § 166, or R. S. 1878, sec. 1178, is sufficient if in the form prescribed by the statute, though it fails to show the year for whose delinquent taxes the lands were sold; and such deed is *prima facie* proof of the grantee's title. R. S., sec. 1176.
2. As the statute directs sales of lands for delinquent taxes of one year to be made in May of the following year, and does not direct that for taxes of former years, the collection of which has been enjoined, the lands shall be sold at that time if released from the injunction, it must be *presumed* that a sale in May, 1874, as recited in the tax deed, was for delinquent taxes of the preceding year.
3. Where taxes are required by law to be assessed in a city by a board of assessors (one elected in each ward), an affidavit to the assessment roll, made by a majority of the board, is sufficient, in the absence of any express provision in the city charter taking the case out of the general rule of the statute. R. S. 1858, ch. 5, sec. 1; R. S. 1878, sec. 4971.
4. In such a case, the affidavit began: "I, N., assessor for the first ward, . . . do solemnly swear that the annexed assessment roll contains, as we verily believe, a complete and perfect list," etc., etc.; "that I have, as far as practicable, valued each parcel," etc.; and it continued thereafter to use the *singular* pronoun, but was signed by a majority of the assessors. The jurat was: "Read to the affiant, and subscribed and sworn to before me," etc. The blank used was one prepared by the secretary of state, adapted to towns, or municipalities having but *one* assessor. *Held*, that the verification was sufficient.
5. Where the question was as to the validity of a tax sale, evidence of the rule followed in assessing taxes for *other* years than that for whose taxes the sale was made, and of the *common report* as to the rule followed in the latter year, was inadmissible.
6. The view taken in *Plumer v. The Supervisors*, 46 Wis., 163, that sec. 12, ch. 334 of 1878 (providing that "no assessor shall be allowed, in any court or place, by his oath or testimony, to contradict or impeach any affidavit or certificate made or signed by him as such assessor"), is valid, adhered to.
7. Under such a statute, evidence of statements or admissions of the assessor

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cannot be received to impeach his certificate, even if such evidence would be admissible independently of the statute.

8. Mere proof that, in an assessment of the property in a city for taxation, there was an undervaluation in a few cases, is not sufficient to show the whole assessment illegal.

APPEAL from the Circuit Court for *Fond du Lac* County.

Ejectment, to recover possession of a lot in the city of Fond du Lac. Complaint in the usual form. The defendants, *Benson* and *Smith*, answered separately, each claiming to be the owner in fee of an undivided one-half of the lot. A jury having been waived, the cause was tried by the court.

The plaintiff read in evidence various conveyances which he claims show title in him, derived from the United States. The defendants, to prove the allegations of their answer, read in evidence a tax deed of the lot to Mary J. Marshall, duly executed in 1877 by the proper officer, on a certificate of sale of the lot made in May, 1874, for nonpayment of taxes, and sundry mesne conveyances, from such grantee, of an undivided half thereof to each of the defendants, *Benson* and *Smith*.

The plaintiff read in evidence the assessor's affidavit to the assessment roll of the ward in which the lot is situated, for the year 1873, which bears the signature of three assessors, and an approval of such roll signed by four assessors. The affidavit commences as follows: "I, Harvey Durand, assessor for the first ward of Fond du Lac city, in said county, do solemnly swear," etc. The jurat is, "Read to the affiant and subscribed and sworn to before me," etc.

The plaintiff also offered to prove the rule of valuation of property for taxation by the assessors in certain years other than 1873; also, by the statements and admissions of the assessors and by common report, the rule of valuation acted upon by the assessors in 1873. The evidence was rejected.

The plaintiff proved that in a few instances property included in the assessment roll of 1873 was undervalued.

Thereafter the court filed its decision, whereby it found as

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facts, (1) that said premises were not owned by the plaintiff when this action was begun; (2) that the defendants did not unlawfully withhold possession thereof from the plaintiff; and (3) that when this action was begun the defendants above named were, and ever since had been, the owners in fee simple, each of the undivided one-half of said premises, and in possession thereof. As a conclusion of law, the court held that the defendants were entitled to judgment against the plaintiff for costs.

From a judgment entered pursuant to such findings and conclusion, the plaintiff appealed.

For the appellant, there was a brief by *Shepard & Shepard*, and oral argument by *G. E. Sutherland*.

For the respondents, there was a brief by *Coleman & Spence*, and oral argument by *Mr. Spence*.

The following opinion was filed February 3, 1880.

LYON, J. It is claimed that the tax deed is void upon its face because it does not show the year in which the taxes were assessed, for the nonpayment of which the lot in controversy was sold and conveyed. It is a complete answer to that objection, to state that the deed is in the form then and now prescribed by statute. Tay. Stats., 437, § 166; R. S., 377, sec. 1178.

The tax deed, being regular on its face, and having been duly witnessed and acknowledged, is presumptive evidence of the regularity of all prior proceedings in respect to the taxation and sale of the lot. R. S., 377, sec. 1176. Its production, therefore, was *prima facie* proof of title in the grantee therein named; and the mesne conveyances from such grantee showed such title in the defendants *Benson* and *Smith*.

Had no attempt been made to impeach the tax deed, undoubtedly the findings of the court and the judgment would be correct. It is to be determined, whether the tax deed is successfully impeached. It must be presumed, we think, that

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the lot in controversy was sold and conveyed for nonpayment of the taxes assessed against it in 1873. This presumption arises from the fact that the statute directs sales of lands for the delinquent taxes of one year to be made in May of the following year, and does not direct that for taxes of former years, the collection of which had been enjoined, the lands should be sold at that time, if released from the injunction.

1. The alleged defects in the affidavit annexed to the assessment roll of 1873 are, that it was signed by but three assessors, and sworn to by but one of them. It is understood that assessments in the city of Fond du Lac are made by a board consisting of one assessor from each of the five wards of the city. The rule of the statute is, that "all words purporting to give a joint authority to three or more public officers, or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall otherwise be expressly declared in the law giving the authority." R. S. 1858, ch. 5, sec. 1; R. S., 1145, sec. 4971. Our attention has not been called to any express provision in the charter of Fond du Lac which takes this case out of the general rule.

2. Conceding (but not holding) that but one assessor made an affidavit, this does not invalidate the tax deed. It is provided in section 2, ch. 334, Laws of 1878, that "no omission by any assessor to take or subscribe the oath required by law by him to be annexed to the assessment roll . . . shall invalidate or in anywise affect the validity of the assessment or tax." The effect of this provision is to render the signing and making of the affidavit by the assessor, which before was mandatory, merely directory. The power of the legislature to make the change was asserted in *Plumer v. The Supervisors*, 46 Wis., 163.

3. The rulings of the court, rejecting evidence of the rule of assessment in certain years other than 1873, and of the common report as to the rule acted upon by the assessors in 1873, were clearly correct. The question in issue related to the

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assessment for that year and no other, and the rule upon which such assessment was made is not one of those facts that may be proved by common report.

We think, also, that the learned judge of the circuit court ruled correctly in rejecting evidence of the statements and admissions of the assessors in respect to the basis upon which they made the assessment in 1873. The act of 1878, chapter 334, sec. 12, provides that "no assessor shall be allowed in any court or place, by his oath or testimony, to contradict or impeach any affidavit or certificate made or signed by him as such assessor." In the opinion by the chief justice in *Plumer v. The Supervisors*, *supra*, we find this language concerning the section just quoted: "Section 12, in effect, disqualifies assessors as witnesses to impeach their own assessments. It was suggested that this was an unwise and oppressive provision. It is not for the court to determine that. It was clearly within legislative power, whether the discretion was wisely used or not. It puts an assessor in precisely the attitude in which the common law puts a juror. *Birchard v. Booth*, 4 Wis., 67. And this the legislature could surely do."

The learned counsel for the plaintiff claim that the language last above quoted is *obiter* in that case, and therefore not binding in this case, in which the question of the validity of the statute is directly involved; and they argue with great ingenuity that it was not competent for the legislature to impose such a disability upon assessors.

It is quite true that the validity of section 12 was not directly involved in that case; but other provisions of the same chapter, enacted in the same view — that is, to secure the collection of the public revenue, — were thus involved. We were compelled to hold certain of those provisions invalid. We were conscious that our judgment would seriously embarrass the state and its municipalities in collecting taxes already levied, and that remedial legislation on the subject would be absolutely necessary. We deemed it our duty, therefore, to consider and

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pass upon all of the provisions of the act which were claimed to be invalid, to the end that the legislature might be in possession of the views of this court when it should proceed to amend and correct the act. Nearly, or quite, all of the features of the act of 1878 which are applicable to this case, were fully and ably argued in *Plumer v. Supervisors*, and the decision was the result of very careful deliberation by this court. It is not, therefore, quite accurate to say that the opinion of the court on the provisions of the act here involved is mere *obiter*. At the same time, it may be conceded that it is not *stare decisis*. The grounds upon which the provisions under consideration were held valid are sufficiently indicated in the opinion by the chief justice, and further discussion of the question here would be profitless. It is sufficient to say that we adhere to our former views. An additional reason for doing so may be found in the fact that the legislature has embodied those views in certain amendments to the act of 1878, enacted in the following year. Laws of 1879, ch. 255.

We conclude that the provisions of sections 2 and 12 of the act of 1878, above quoted, are valid laws.

4. If the assessor may not by his oath or testimony impeach his affidavit or certificate as such assessor, it seems clear that the same cannot be impeached by showing the unsworn statement of the assessor that his affidavit or certificate is false. To allow this would be to allow a thing to be done indirectly which cannot lawfully be done directly. We cannot think the legislature intended any such result when it enacted section 12.

Another objection to the rejected testimony may be plausibly urged, independently of the act of 1878. The fact sought to be proved was, that the valuation of property for taxation in 1873 was made upon an unauthorized basis or rule. It is very questionable whether proof of the unsworn statement of an assessor can, under the general rule of evidence which excludes hearsay testimony, be received to establish that fact.

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Strike out section 12, and we should still hesitate long before giving our sanction to the admission of such testimony.

5. Applying the principles above stated, the only testimony remaining in the case tending to show that the assessment of 1873 was made upon an illegal basis, is the testimony that in a very few cases the assessors undervalued property. There is no legal and competent proof that such undervaluation was intentionally made, pursuant to a vicious rule of valuation adopted and acted upon by the assessors. It may have been the result of a mere error of judgment, and if so it does not invalidate the assessment. We think the testimony entirely insufficient to establish the proposition that the assessment was illegal.

6. In making proof of his title, the plaintiff showed a chain of conveyances of lands which include the lots in controversy, from the United States to James Duane Doty. The conveyances are not inserted in or annexed to the bill of exceptions, but it appears that in the conveyance to Governor Doty he is described as president and trustee of the Fond du Lac Company. The plaintiff also read in evidence the record of a declaration of trust in respect to lands including this lot, executed by Doty to the stockholders of that company, which bears even date with the conveyance to Doty, January 19, 1836. The next instrument offered was the record of a conveyance of the same land by Samuel Ryan, president of the Fond du Lac Company, to the grantor of the plaintiff. No conveyance by Doty was proved, and there was no evidence that Ryan was the president of the company when he executed the conveyance above mentioned.

Although we have not the above instruments before us, we assume that Doty took his conveyance in trust for the company. The Fond du Lac Company was duly incorporated by an act of the territorial legislature, approved February 9, 1842. Laws of 1842, p. 12. The effect of certain provisions in that act seems to be to vest in the company the legal title to the

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lands theretofore held in trust for it. Before the passage of that act the articles of association of the company provided that the president should convey lands held by him in trust for the company, when directed to do so by its board of directors; and the act confirms all conveyances so made. The act also authorizes the corporation to make by-laws, rules and regulations for the conveyance of its estate, both real and personal, and confirms all conveyances executed pursuant thereto. The record does not state the date of the conveyance executed by Ryan, and we have no means of knowing whether it was executed before or after the act of 1842 was passed. But in either case, if Doty held the land in trust for the company, and Ryan was president of the company, and conveyed the land pursuant to the direction of the proper board, or in accordance with the by-laws of the company, he conveyed a good title.

It is unnecessary in the present position of the case to pass definitely upon the plaintiff's title as it stood before the execution of the tax deed, and we shall not do so. But should the plaintiff elect to take a new trial under the statute (R. S., sec. 3092), we suggest to his counsel that it will be the safer course to show that Ryan had proper authority to execute the conveyance.

By the Court. — The judgment of the circuit court is affirmed.

The following additional opinion was filed March 9, 1880:

LYON, J. In the opinion prepared by me and recently filed in this cause, the question whether more than one assessor verified the assessment roll was not passed upon, but the roll was held valid even though verified by but one assessor. It was so held because of section 2, ch. 334, Laws of 1878, and an affirmation in *Plumer v. The Supervisors*, of the right of the legislature to make the requirement for an affidavit to the

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assessment roll directory merely; but it was strangely overlooked that we held that the section left the requirement mandatory.

Section 2 passed into the Revised Statutes as section 1164 *b*, and by that designation was repealed by section 4, ch. 255 of 1879. The blunder in the opinion (for which the writer alone is responsible), in regarding the requirement that the assessors shall verify the assessment roll in the manner prescribed by statute as directory merely, renders it necessary to determine whether the roll in the present case was properly verified. If it was, the result is the same, and the judgment first announced must stand. We are all of the opinion that the roll was properly verified, and were of that opinion when the cause was decided.

The commencement of the affidavit, "I, Harvey Durand, Assessor of the First Ward," etc., is not very significant. It is matter of form, and its insertion in the affidavit may readily be accounted for in view of the facts that the form of assessment blanks is prescribed, and the blanks are furnished, by the secretary of state, and the form here used is the one adapted to each town or municipality having but one assessor, and was undoubtedly furnished by the secretary. The material fact is, that a majority of the board of assessors signed the affidavit, and the jurat, although in the singular — "read to the affiant," etc. — is applicable to each of the signers. Besides, we must presume (nothing insuperable appearing to the contrary) that the assessors signing the affidavit complied with the law by swearing to it — there being a jurat, which makes the presumption admissible.

For these reasons, notwithstanding the error in the former opinion, we think the cause was correctly decided.

Flanders vs. The Town of Merrimack and another.

FLANDERS VS. THE TOWN OF MERRIMACK and another.

February 7 — March 9, 1880.

(1) *Validity and application of tax-law of 1878-9.* (2) *Reference in existing statute to repealed statute.*

1. Ch. 334 of 1878, as amended by ch. 255 of 1879 (by which one who seeks by suit to avoid a tax for irregularities going to the groundwork thereof, can obtain that relief only upon payment of the tax justly chargeable against him, ascertained by a proper reassessment as there provided for), is valid; and it applies to suits commenced before but tried after its passage.
2. Where a statute still in force refers to one since repealed, the latter may be resorted to for the purpose of construing the former; and, notwithstanding the repeal of section 1210 *a*, R. S. 1878, the words of section 1210 *b*, "any of the causes mentioned in sec. 1210 *a*," etc., are to be understood as if the enumeration of causes thus referred to were incorporated in sec. 1210 *b*.

APPEAL from the Circuit Court for *Monroe* County.

The action was commenced in January, 1878, to restrain the collection of certain taxes assessed against the plaintiff, in 1877, on his lands in the defendant town, and to set aside the assessment and tax levy for that year. The complaint contains averments of fact showing that irregularities going to the groundwork of the tax, and affecting all the taxable property in the town, were committed in making the assessment in question. The defendants answered, denying the material allegations of the complaint. The cause was tried in April, 1879, and resulted in a finding that the tax in controversy is void because of certain specified irregularities in making the assessment, and that the plaintiff is entitled to the relief demanded by him. The court thereupon made the following order:

"This action having been brought to a hearing and heard upon the issues joined herein, and the court having found and being of the opinion that, for reasons contained in the finding of fact filed herein, affecting the groundwork of the taxes

48	567
84	402
48	567
96	633

48	567
107	425
107	427
107	429
108	669

48	567
72	522

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mentioned in the pleadings herein, and affecting all the property of said town of Merrimack, said assessment of said town of Merrimack, and the tax proceedings based thereon, should be set aside; and, on motion of the attorney for said defendants, and after hearing the attorney for said plaintiff in opposition thereto, and it being admitted that more than nine-tenths of the taxes of said town, exclusive of the taxes on plaintiff's land, had been paid prior to the commencement of this action —

“Ordered, that all proceedings in this action be, and they hereby are, stayed until a reassessment of the property of said town of Merrimack can be made.”

From this order the plaintiff appealed.

For the appellant, there was a brief by *Flanders & Bottum*, his attorneys, and one by *Hastings & Greene* and *Tracy & Bailey*, and oral argument by *J. G. Flanders*.

For the respondents, there were separate briefs by *G. Stevens*, their attorney, and *H. J. Huntington*, of counsel, and oral argument by *Mr. Stevens*.

LYON, J. 1. This court has held in numerous cases that “violations or evasions of duty imposed by law to secure a just and uniform rule of assessment, whether occurring by mistake in law or fraud in fact, which go to impair the general equality and uniformity of the assessment, and thereby to defeat the uniform rule of taxation, vitiate the whole assessment as the foundation of a valid tax.” The cases which recognize and enforce this principle are collated in the opinion by the chief justice in *Marsh v. The Board of Supervisors of Clark County*, 42 Wis., 502, from which the above quotation is taken. It was also held in that case that, under then existing laws, the court could not require a plaintiff seeking to avoid an illegal tax to pay his just proportion of a valid tax as a condition of equitable relief, because it was impossible for the court to say what would be such just proportion.

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The series of decisions on the assessment and taxation laws which culminated in *Marsh v. The Supervisors*, led to the bringing of numerous actions to avoid alleged illegal taxes levied in certain portions of the state, where the essential requirements of those laws had been habitually and most grossly disregarded and violated by the officers charged with their execution. This is doubtless one of those actions; for *Marsh v. The Supervisors* was decided in October, 1877, and this action was commenced January 5, 1878. The effects of the judgments in the cases above referred to were seriously to impede the collection of the public revenue, and greatly to embarrass many of the municipalities of the state in their financial affairs. This evil was foreseen, and we would gladly have avoided giving the judgments which produced it. But the imperative mandate of the constitution, "The rule of taxation shall be uniform," closed against us every avenue of escape. The legislature of 1878 attempted to remedy the evil, as far as it could be remedied by legislation. Hence the enactment of chapter 334 of that year. Section 5 of that chapter provides that in all actions thereafter tried upon issue joined in any of the courts of this state to set aside any assessment, tax or tax proceeding, if the court is of the opinion, after a hearing, that for some reason affecting the groundwork of the tax and affecting all the property in the municipality, the assessment, tax or tax proceeding should be set aside, it shall stay proceedings in the action until a reassessment of the taxable property in such municipality can be made by the proper authorities thereof. The section then provides that the assessor shall make such reassessment in the manner prescribed in the act, and that the clerk shall extend thereon the amount of taxes for the year in question. The section as revised (R. S., 386, sec. 1210 *b*) requires the reassessment to be submitted to and passed upon by the proper board of review. It further provided that the reassessment roll and taxes so extended thereon should be *conclusive* evidence of the

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amount of tax justly chargeable against the plaintiff on the property concerning which the action was brought, or upon any other property in such roll concerning which any other similar action should be brought.

The act of 1878 was before us for consideration, and the validity of section 5 was directly involved, in the case of *Plumer v. The Supervisors of Marathon Co.*, 46 Wis., 163. After full consideration, aided by able arguments of counsel, the court held it competent for the legislature to provide for a reassessment, and a stay of proceedings in the action until the same should be made; and to provide further that, when regularly made, and the taxes for the proper year extended thereon, the plaintiff should be required, as a condition of relief, to pay the just amount of his taxes thus ascertained. The section was held invalid on the sole ground that it made the first reassessment *conclusive* evidence of the amount of taxes justly chargeable to the plaintiff. For reasons stated in the opinion, and also in the very late case of *Marshall v. Benson* (ante, p. 558), the whole act of 1878 was reviewed, and the views of the court in respect to its various provisions stated in the opinion. Many of those provisions were not involved in the case; but the construction and validity of section 5 were directly involved therein, and constituted the very point of the judgment.

The decision in *Plumer v. The Supervisors*, which was announced during the session of the legislature of 1879, was followed by the enactment of chapter 255 of that year, which amends chapter 334 of 1878, or rather section 1210 *b*, R. S., which stood as the revised section 5, so that the reassessment roll and taxes extended thereon are made *prima facie* evidence only of the amount of tax which the plaintiff ought to pay. This amendment removed the only impediment to the validity of the section which the court was able to find in the *Plumer* case. The amended act prescribes the procedure to contest the validity of the reassessment, and further provides as fol-

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lows: "If such reassessment and tax roll shall be held by the court regular and valid, or if no objections thereto shall be filed by the plaintiff, the court shall make an order requiring the plaintiff to pay into court, for the use and benefit of the defendant, the amount which by such valid reassessment he justly ought to pay. If the amount of tax imposed upon the plaintiff's property by such valid reassessment shall equal or exceed the amount imposed thereon by the original assessment and tax roll, the plaintiff shall be adjudged to pay costs of such suit; otherwise the plaintiff, upon complying with the order of the court last aforesaid, shall be entitled to judgment, with costs."

The provisions of the amended act just quoted doubtless express the purpose sought to be accomplished by chapter 334 of 1878, although not expressed therein. That object was manifestly to ascertain, through the process of reassessment, the amount of the plaintiff's proportion of the whole tax for the year in question which equitably he ought to pay, to the end that the court might require him to pay it as a condition of relief.

Laws for the reassessment of property for taxation and for the relevying of taxes thereon, in cases where a former assessment and tax levy have been adjudged invalid, are not strangers to our statute books or jurisprudence. The judgments of this court in *Knowlton v. The Supervisors of Rock Co.*, 9 Wis., 410, announced in October, 1859, and in *Weeks v. Milwaukee*, 10 Wis., 212, announced in January, 1860, invalidated all taxes levied in many of the municipalities of the state for several preceding years. To remedy the disastrous consequences which would otherwise necessarily result to some of those municipalities, to save them from liability to a multitude of actions to avoid such invalid tax levies, and to enable them to collect the public revenues, without which their functions could not be performed, the legislature of 1860 enacted special laws authorizing Racine (chapters 31 and 49), Milwaukee

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(chapter 301), and Watertown (chapter 333), to reassess the taxes levied therein for the years 1856 to 1859, inclusive, and to levy and collect so much thereof as remained uncollected. Some of these acts, perhaps all of them, provided for repayment of the surplus to those who had overpaid their taxes. A similar act was passed at a subsequent session for the relief of the city of Janesville (chapter 48, P. & L. Laws of 1862), covering the taxes levied for the years 1854 to 1858, inclusive. Other statutes of the same character applying to some of the same, and perhaps to other, municipalities may be found in the annual statutes. These enactments came under the scrutiny of this court in *Tallman v. Janesville*, 17 Wis., 71, and *Cross v. Milwaukee*, 19 Wis., 509, and were held to be valid laws; and in *Peters v. Myers*, 22 Wis., 602, it was held that the reassessed tax was a debt due and a lien upon the property reassessed from the time it should have been first assessed. See, also, *May v. Holdridge*, 23 Wis., 93; *Mills v. Charlton*, 29 Wis., 400; *Evans v. Sharp*, id., 564; *Dill v. Roberts*, 30 Wis., 178.

Although the act of 1878, ch. 334, as amended by chapter 255 of 1879, does not provide (as did the legislation of twenty years ago) for the actual adjustment of the taxes on a legal basis with each tax payer of the municipality, whether he had paid the taxes illegally assessed against him in the first instance or not, yet it is essentially a reassessment law. Because it does not so provide, many of the details which were necessary in the former laws are unnecessary in the act of 1878 as amended. The assessment of a tax is the process prescribed by law to ascertain the sum of money which the owner of taxable property ought to pay, on account of such property, towards the support of the government for a given time. If assessed by a uniform rule, and in substantial compliance with the requirements of law, the ascertained amount becomes a debt legally and equitably due from the person assessed to the government or municipality assessing the tax. If not so as-

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sessed, the legislature may provide that the tax be reassessed on correct principles and in legal form. When this is done, the payment of the reassessed tax becomes, in like manner, obligatory upon the person charged with it.

The method of enforcing payment of a tax when legally assessed, is entirely within the discretion of the legislature. It may be made a lien upon the property assessed for taxation, and the same may be sold and the tax paid out of the proceeds; or payment may be enforced by distress and sale of the property of the person taxed; or it may be collected by suit at law; or, as in the present case, it may be enforced by requiring the person charged with an illegal tax, who seeks relief in equity, to pay the amount legally chargeable to him as a condition of relief. And it is possible that equity would not relieve against a tax assessed on correct principles in accordance with law, even though the statute prescribed no means to enforce payment. The methods of enforcing payment of taxes are not necessarily within the uniform rule of the constitution, but, as just stated, are within the discretion of the legislature, and may be adapted to the exigencies of each particular class of cases. The legislature has deemed the method prescribed by the amended act of 1878 adequate to enforce payment of the reassessed taxes; and it is not for us to say that such method is inadequate for that purpose.

Conceding that the broad and ample provisions of the above cited acts of 1860 and 1862, to enforce payment of reassessed taxes, are preferable, still we cannot say that the reassessment provided for in the act of 1878, as amended, is invalid for want of those provisions. If the requirements of that act are complied with, there will be a valid reassessment and a valid tax, notwithstanding some more effectual means might have been devised to enforce payment of such tax. The act of 1878, as amended, leaves it optional with the tax payers of the town of Merrimack to pay the taxes assessed against them in 1877, or to resist payment thereof. It appears in the

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order appealed from, that nine-tenths of them chose the former course and paid the tax now adjudged to have been illegally assessed. The findings of the court show that these have paid more than their just share of taxes. But they are not here contesting the validity of the tax. They have exercised their option, and must be content. What principle of equity or law will be violated if those who elect to contest the validity of the tax, and who ask a court of equity to restrain the collection thereof and set aside the tax proceedings, are required, as a condition of relief, to pay the amounts of taxes which are justly chargeable to them? Because the law of 1878, as amended, makes ample provision for reassessing the tax by a uniform rule in accordance with existing laws, and thus ascertaining the amount legally and equitably chargeable to the plaintiff, and because it is an inherent principle in equity jurisprudence that he who would have equity must do equity, we should be constrained to hold, as an original proposition, that the amended act of 1878 is a valid law.

The constitutional declaration that every person is entitled to a certain remedy in the law, and ought to obtain justice freely, without being obliged to purchase it, completely without denial, promptly without delay, conformably to the laws (Const., art. I., sec. 9), is invoked to overthrow the amended act of 1878. The remedy to which a party is entitled is frequently uncertain until made certain by the judgment of the court; litigation has always been attended with expense; delays have always occurred in the progress of law suits; and parties have often failed, through defect of proof or other causes, to get their just rights at the end of litigations. Notwithstanding the declaration in the constitution, doubtless these things will continue to happen; for there has not yet been developed sufficient wisdom on earth to establish a system of jurisprudence free from these hindrances to absolute justice; and the framers of the constitution never supposed that they could do so in a paragraph, and did not attempt it.

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The declaration simply means that laws shall be enacted giving a certain remedy for all injuries or wrongs, and that the rights of every suitor shall be honestly and promptly adjudicated, and enforced in conformity with the laws. We find nothing in the act under consideration which contravenes that declaration.

We have made the foregoing observations upon the act, not because they are necessary to a decision of the question of its validity, but in deference to the very able argument on the subject submitted by Messrs. Hastings & Greene and Tracy & Bailey, who, although not of counsel in the cause, are of counsel in other causes involving the same question, and who have, by permission, kindly submitted to us an argument of the question. We rest our judgment that the act of 1878, as amended, is a valid law, upon the decision in *Plumer v. The Supervisors*, *supra*; and on the authority of that case we should so hold, even though we now doubted the correctness of that decision, which we do not. We leave this branch of the case with the single remark, that the reassessment is to be made of the property which should have been assessed in the first instance, and upon the basis of the value of such property in the year that it should have been assessed, which in this case is the year 1877. This is obvious.

2. It is argued with great earnestness and ingenuity, that the amended act of 1878 is not applicable to this case, for the reason that the issue herein was joined before the act was passed, or at least before the enactment of the amendatory act of 1879, which gave it validity. Considering the manifest object of the legislation in question, made apparent by the circumstances existing when these acts were passed, and the evils which the legislature sought to remedy, as well as the language employed, we cannot doubt that the act is applicable to all of the specified cases tried after its passage, upon issues joined therein, without regard to the time when the actions were commenced or when the issues were joined. The lan-

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guage of the law is, "in all actions hereafter tried upon issue joined," etc. To construe this language to mean "issue *hereafter* joined," would come very near being an interpolation, and would, we believe, do violence to the plain and obvious intention of the legislature. If the action is disposed of without issue, the law has no application to it; and if the plaintiff show himself entitled to relief, he must have it without condition. Otherwise, if issue shall have been joined. This, we think, is the plain, natural import of the language employed. We hold, therefore, that this case is ruled by the law in question.

3. A single question remains to be considered. Section 1210*b*, R. S., corresponds with section 5 of 1878. The former section refers to section 1210*a* in these words: "In all actions hereafter tried upon issue joined in any of the courts of this state, in which it shall be sought by either party to avoid or set aside, in whole or in part, any assessment, tax or tax proceeding, for any of the causes mentioned in section 1210*a* of these statutes," etc. The act of 1879 repeals section 1210*a*. One of the learned counsel argues (if we correctly understood his argument), that since its repeal no resort can be had to it to ascertain the scope of section 1210*b*. The point is not well taken. Although section 1210*a* is not a law and has no longer the form of a law, it was not annihilated by its repeal, and a reference to it in the following section is just as effectual as ever it was to determine the cases to which the latter section is applicable. That section has the same force and effect as it would have were the words, "on the ground that such assessment, tax or tax proceeding is for any reason invalid," etc., inserted therein, instead of the words "for any of the causes mentioned in section 1210*a* of these statutes."

By the Court.—The order of the circuit court is affirmed.

Tewksbury vs. Schulenberg and others.

TEWKSBURY VS. SCHULENBERG and others.

February 24 — March 9, 1880.

(1, 2) *Secondary Evidence.* (3) *Cause of Action.* *Franchise: How far compliance with legislative requirements must be shown.*

1. In an action for tolls due upon logs run through plaintiff's dam, defendants having failed to produce, upon due notice, the scale book of the logs cut at their camp, there was no error in admitting secondary proof of the contents of such book (by testimony of the person who kept it), together with the evidence that all the logs so scaled were run through the dam.
2. Where defendant's agent, charged with cutting, hauling and getting out the logs, employed a person to keep another scale book, at the landing, and such book had been delivered to and retained by defendants, and they had made settlements for stumpage in accordance therewith: *Held*, that testimony of their said agent as to its contents was properly admitted.
3. Plaintiff was authorized by statute to maintain certain dams, with a proviso that they should not raise the water above a certain height; was required to build and maintain suitable slides and flood-gates for specified purposes, keep them in repair, and also keep them open at certain times; and when he should have completed "said dams as aforesaid," was to have power to collect tolls on logs, etc., passing over the slides or driven by the aid of the dams, as a compensation for maintaining such dams; with a proviso that he was at all times to comply with the provisions as to slides and flood-gates. *Held*, that, upon showing that his dams were "in good repair" and "fit to run logs through," that the slides and gates were sufficient, and that defendants could not have run their logs through without the aid of such dams, he was entitled to recover the tolls, without further proof on his part of compliance with the statutes.

APPEAL from the Circuit Court for *St. Croix* County.

Action to recover plaintiff's charges for aiding the defendants in driving logs out of the north fork of Clam river by means of dams constructed and maintained therein by the plaintiff. Plaintiff claimed the right to maintain the dams and make the charges in question under ch. 154 of 1874 as amended by ch. 263 of 1876.¹

¹Sec. 1 of the act of 1874, above mentioned, authorizes the plaintiff, his
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After the close of the testimony, a motion by defendants for a nonsuit was denied, and the jury, by direction of the court, returned a verdict for the plaintiff for the sum demanded; and, from a judgment pursuant to the verdict, the defendants appealed.

For the appellants, there was a brief by *Baker & Spooner* and *McClure & Marsh*, and oral argument by *Mr. Marsh*. They contended, among other things, that where a right is given by a private act of the legislature upon conditions precedent, the party claiming under the act must plead and prove performance of such conditions (*Hewitt v. Town of Grand Chute*, 7 Wis., 282; *People v. Turnpike Road Co.*, 23 Wend., 206, per NELSON, C. J.; *State v. Curry*, 1 Nev., 251); and that in this case there was no proof that plaintiff's dams did not raise the water to exceed twelve feet, nor that they had

heirs and assigns, to maintain a dam or dams across the north fork of Clam river, at certain specified points, "provided, that such dam or dams shall not raise the water to exceed twelve feet." Section 2 provides that "the aforesaid *Tewksbury*, his heirs or assigns, shall build suitable slides in said dam or dams, for running logs, timber and lumber over the same, and shall keep the same in repair; they shall be kept open at all times when said river is at a driving stage and there are logs, timber or lumber to run over said dams, and when it is not necessary to hold the water back for the purpose of driving or flooding logs, timber or lumber below the said dam or dams, for which purposes flood-gates shall be kept in repair and built in such manner as to shut in such manner as the case may require, to flood said logs, timber or lumber." Sec. 4, as amended, provides that, "when the aforesaid *Tewksbury*, his heirs or assigns, shall have completed the said dam or dams as aforesaid, the said *Tewksbury*, his heirs or assigns, are hereby authorized and empowered to receive and collect from the owners of all lumber, timber and logs, passing over such slides or driven by the aid of such dams, as a compensation for maintaining such dam or dams, the sum of fifteen cents per thousand feet, board measure, the amount to be ascertained by scale on the landings in the woods; and the aforesaid *Tewksbury*, his heirs and assigns, shall have a lien on all logs, timber and lumber run over said dam or dams, or driven by the aid thereof, until the charges aforesaid shall be fully paid, which lien may be enforced in the same manner as the lien of laborers upon logs; provided, that the said *Tewksbury*, his heirs and assigns, shall at all times comply with the provisions of section 2 of this act."

Tewksbury vs. Schulenberg and others.

been kept in repair, nor that the gates had been kept open or closed as provided in the charter, nor that the flood-gates were constructed in the manner there provided. Counsel also contended that the court erred in admitting incompetent evidence as to the quantity of logs run through the dam.

For the respondent, there was a brief by *John W. Bashford* and *O. H. Comfort*, his attorneys, with *Bashford & Spilde*, of counsel, and oral argument by *R. M. Bashford*.

COLE, J. It was undoubtedly incumbent on the plaintiff to show the amount of logs owned by the defendants which had been run over his dams, on which he claimed to be entitled to collect toll. This, we think, he did do by the best proof within his power to offer upon the subject. The witness Daniel Fox testified, in substance, that he had charge of the defendant's books at the camp where the logs in question were cut; and that he kept an account of each day's work, and himself recorded in these books, from the scaler's shingle, the quantity scaled. He said that, without the books, from his recollection, he could state the amount appearing by the books to have been scaled; and he gave the amount. The scale book was in the possession of the defendants, who had been served with due notice to produce it on the trial. They failing to produce the book, there can be no doubt that the plaintiff was entitled to give secondary evidence of its contents, even if the testimony of the witness had been objected to, as it was not.

There was certainly evidence from which the jury might well have found that all these logs which were banked and scaled for the defendants, above the plaintiff's dam, during the winter of 1875-6, were run through the dam. But it is insisted that the court erred in admitting the testimony of the witness Patrick Fox against the defendants' objection. This witness had charge of and conducted the business of cutting, hauling and getting out the logs for the defendants that winter; indeed, he had an interest in the profits of the business.

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He states the number of feet which were banked, sluiced and run through the plaintiff's dam. He said he employed a competent young man to do the scaling at the landing, and examined the books in which the scale was recorded from time to time. He testified as to the contents of the scale book; and as to the amount of logs thus got out. It is said that all this evidence relating to the quantity of logs scaled and run through the plaintiff's dam, which was thus founded on the scale book, was in the nature of the declarations of an agent, and is not admissible to prove a claim against the principal. It seems to us that this objection is wholly untenable. The plain purpose of this testimony was to prove the quantity of logs scaled as shown by the scale book. It was strictly secondary evidence of the contents of a book in the possession and under the control of the defendants, which they were required to produce at the trial.

The able counsel for the defendants would surely not wish to be understood as controverting so elementary a principle in the law as that a party may give secondary evidence of the contents of a book or instrument in the possession of his adversary, who, after due notice, has refused to produce such book or instrument. It is true, the entries in the scale book were made by persons employed by Patrick Fox, and not by the defendants. But still it appears that the scale book was delivered to the defendants and retained by them, and they had actually made settlements for stumpage based upon the accuracy of its contents. Having thus treated the book the same as though the entries had been made by one of their own servants, the witness might testify as to its contents; for presumably the book was correct as to its entries. If the testimony as to its contents was not correct, the defendants certainly had the means at hand to disprove it. They had but to produce the book itself, the superior evidence, to put an end to all controversy upon the point. Under the circumstances we have no doubt that the evidence objected to was admissible.

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The amendment to the complaint, so as to make it state the true amount of logs proved to have been driven through the dams in question, was properly allowed. It was a matter not material, and rested largely in the discretion of the court below.

It is further objected that the court erred in directing a verdict for the plaintiff, because of his failure to prove that he had performed the conditions precedent necessary for him to perform in order to recover toll for the use of his dams. But we think this objection cannot prevail. The plaintiff testified that his dams were in good repair, fit to run logs through, and that the defendants could not have driven their logs without the use of his dams. He certainly showed a right to recover toll on the logs run by means of his dams.

It follows from these views that the judgment of the circuit court must be affirmed.

By the Court.—Judgment affirmed.

TEWKSBURY VS. BRONSON and another.

February 24 — March 9, 1880.

LIEN: ASSIGNMENT. (1) *When statutory right to lien does not pass by assignment.*

LIEN ON LOGS. (2, 3) *Amendment of complaint to charge personally a different defendant.*

1. The general rule in this state is, that, in the absence of any statutory provision to the contrary, the assignment of a claim for which the assignor may have by law a specific lien, before action, destroys the right to the lien (*Caldwell v. Lawrence*, 10 Wis., 331); and a reassignment to him does not revive the lien.
2. An action to enforce a lien given by statute for tolls on logs run through plaintiff's dam, is an action at law on contract (*Marsh v. Fraser*, 27 Wis., 596).
3. In such an action against X and Y, the complaint, alleging that X owned the logs and that Y had some claim upon or interest in them, demanded a personal judgment against X for the amount of the tolls, and that

48	581
598	583
48	581
1102	587

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the same be declared a lien upon the logs. It appearing on the trial that Y owned the logs, and the action being dismissed as to X, it was an abuse of discretion to refuse plaintiff permission to amend the complaint so as to demand a personal judgment against Y.

APPEAL from the Circuit Court for *St. Croix* County.

Plaintiff is the owner of certain dams across Clam river, in Barron county, erected and maintained by him pursuant to authority conferred by chapter 154, Laws of 1874, as amended by chapter 233 of 1876. This action is to enforce a lien on a quantity of logs sluiced through such dams in 1876, for the tolls which the act authorizes the plaintiff to charge therefor. The action was originally brought against the members of the firm of T. & J. Sutton and the above named defendants. The complaint avers that logs marked with four specified marks were thus sluiced through the dams; that T. & J. Sutton were the owners of such logs; and that *Bronson & Folsom* had some claim or interest in them. A personal judgment is demanded against the Suttons for the amount of such tolls, and that the same be declared a lien on the logs. The defendants answered jointly, that, before the action was commenced, the plaintiff assigned the claim in suit to a third party. The remainder of the answer is substantially a general denial. On the trial, the plaintiff testified that he did assign the claim as alleged in the answer, but that the assignee re-assigned the same to him before the action was commenced. The testimony tended to show that logs bearing three of the marks specified in the complaint were passed through the plaintiff's dams, and that those marked with two of the marks (being most of the logs on which toll is demanded) belonged to *Bronson & Folsom*, and the remainder to the Suttons. On motion of the plaintiff, the action was dismissed as to the Suttons, and all the averments in the complaint relating to the logs marked with their mark were stricken out. The plaintiff also asked leave further to amend the complaint "by changing the prayer for relief therein so as to demand a per-

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sonal judgment against *Bronson & Folsom*, so that said complaint will conform to the facts as proved." The circuit court denied the motion and nonsuited the plaintiff. Judgment was entered dismissing the action, with costs; and plaintiff appealed from the judgment.

For the appellant, there was a brief by *John W. Bashford* and *O. H. Comfort*, his attorneys, with *Bashford & Spilde*, of counsel, and oral argument by *R. M. Bashford*. They contended, 1. That the amendment asked for by plaintiff, if deemed necessary to entitle him to a money judgment against *Bronson* and *Folsom*, should have been allowed. "If the plaintiff demands relief in equity, when, upon the facts stated, he is only entitled to a judgment at law, or *vice versa*, his action does not, as formerly, fail because of the mistake. He may still have any judgment appropriate to the case made by the complaint." *Leonard v. Rogan*, 20 Wis., 542. To the same effect are *Fox R. V. Railroad Co. v. Shoyer*, 7 Wis., 365; *M. & M. Railroad Co. v. Finney*, 10 id., 388; *Brandeis v. Neustadtl*, 13 id., 142; *Tenney v. State Bank*, 20 id., 152; *Stroebe v. Fehl*, 22 id., 337; *Hopkins v. Gilman*, id., 476; *Schumaker v. Haveler*, id., 43. And where an issue not presented by the pleadings has been fully litigated on the trial, the complaint or answer may be amended to conform to the facts proved. R. S. 1878, secs. 2830, 2669, 2671; Dixon's note to *Brayton v. Jones*, 5 Wis., 627; *Vilas v. Mason*, 25 id., 310; *Gilbank v. Stephenson*, 31 id., 592; *Giffert v. West*, 33 id., 617, 622; *Hodge v. Sawyer*, 34 id., 397; *Flanders v. Cottrell*, 36 id., 564; *Weston v. McMillan*, 42 id., 567; *Russell & Co. v. Loomis*, 43 id., 545. See the whole subject of amendment under the code fully discussed in *Supervisors v. Decker*, 30 Wis., 624; and the rule and reasoning in that case adopted in *Pomeroy on Remedies*, etc., §§ 562, 564. Counsel criticised an apparently conflicting statement in *Wrigglesworth v. Wrigglesworth*, 45 Wis., on p. 259, as not sustained by the authorities cited. He further cited, in support of the proposed

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amendment, *Lackner v. Turnbull*, 7 Wis., 105, referred to approvingly in *Nary v. Henni*, 45 Wis., 475; *Moore v. Ruggles*, 15 id., 275; *Witte v. Meyer*, 11 id., 295; *Challoner v. Howard*, 41 id., 355; *State ex rel. Mitchell v. Smith*, 14 id., 564; *Tewksbury v. Schulenberg*, 41 id., 592; Pomeroy's Rem., § 580; R. S., secs. 2646, 2886; *Dunning v. Stoval*, 30 Ga., 444; *Glacius v. Black*, 50 N. Y., 145, and 67 id., 563. 2. That under the statute authorizing the maintenance of a dam, and declaring that "the aforesaid *Tewksbury*, his heirs and assigns, shall have a lien on all logs, . . . until the charges aforesaid are fully paid," plaintiff's lien was assignable; that even if that were otherwise, it would not be extinguished by the transfer of the claim, but the right to enforce it would be suspended merely, and the remedy was restored as soon as the claim was reacquired by the plaintiff. Phillips on Mech. Lien, §§ 266, 278; id., § 56 and cases there cited; 2 Washb. R. P., 292; *Kerr v. Moore*, 54 Miss., 286; *Davis v. Bilsland*, 18 Wall., 659; *Tuttle v. Howe*, 14 Minn., 145; *Laege v. Bossieux*, 15 Gratt., 83; *Skyrme v. O. M. & M. Co.*, 8 Nev., 219; *Ritter v. Stevenson*, 7 Cal., 389; *Goff v. Papin*, 34 Mo., 177. Plaintiff was therefore entitled at least to a judgment establishing his lien against *Bronson* and *Folsom*.

For the respondents, there was a brief by *Baker & Spooner*, their attorneys, with *McClure & Marsh*, of counsel, and oral argument by *Mr. Marsh*. They contended, 1. That as a condition precedent to any right to recover, plaintiff must have constructed and maintained the dams in the manner prescribed by secs. 1 and 2, ch. 154, Laws of 1874, under which he claims; and his failure in several important particulars to make proof of any compliance with the requirements of that act was of itself a sufficient ground of the nonsuit. 2. That the testimony failed to show the quantity of logs that went over the dam, and such failure was fatal to plaintiff's right to recover in the action. 1 Wharton on Ev., § 356. 3. That there was no proof that *Bronson & Folsom* owned the logs.

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4. That there was no error in refusing to allow an amendment of the complaint so as to make it demand a personal judgment against *Bronson & Folsom*. The refusal was "entirely within the discretion of the court, and not the proper subject of exception." *Binnard v. Spring*, 42 Barb., 470; *Onondago Co. Ins. Co. v. Minard*, 2 N. Y., 101; *Olendorf v. Cook*, 1 Lans., 37. Sec. 2830, R. S., authorizes the court to allow an amendment of the pleading to make it conform to the facts proven, when such amendment does not change substantially the claim or defense. But the amendment there proposed would have been a substantial change in the claim against *Bronson & Folsom*. The action against them was purely equitable, and judgment could not go against them on a cause of action purely legal. *Wrigglesworth v. Wrigglesworth*, 45 Wis., 256, and cases there cited; *Nosser v. Corwin*, 36 How. Pr., 540.

5. That the lien granted by statute is simply in aid of the judgment against the owners of the logs; and, the action having been dismissed against the Suttons, who were the debtors, the lien fell with it. 6. That the assignment of the claim before the commencement of the action destroyed the lien. *Caldwell v. Lawrence*, 10 Wis., 331.

LYON, J. 1. By granting the nonsuit, the learned circuit judge necessarily held that the assignment by the plaintiff of the claim for tolls destroyed the right to a lien therefor on the logs, and that such right was not restored by the reassignment of the claim to the plaintiff before the action was brought.

In *Caldwell v. Lawrence*, 10 Wis., 331, this court held that the right to a lien given by statute to mechanics and others is not assignable, but is a mere personal right, which cannot be prosecuted by the assignee of the debt or demand for labor or materials in his own name. In that case the petition for the lien was filed by the person who furnished the materials before he assigned the claim to the plaintiff. In substance and

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effect this is a ruling that the assignment of a claim before action, by one who might enforce a specific lien therefor, destroys the right to such lien and reduces the claim to a mere personal demand. The fact is mentioned in the opinion that the legislature had previously taken the same view of the statute by providing for the enforcement of a lien in a specific case by an assignee. Laws of 1859, ch. 113. In 1862 the same provision was incorporated in the law giving a lien on logs and lumber for work and supplies in certain counties. Tay. Stats., 1772, § 45.

The plaintiff's right to a lien for tolls depends upon section 4, ch. 154 of 1874, as amended by chapter 263 of 1876, which gives the lien and authorizes its enforcement "in the same manner as the lien of laborers on logs." In respect to such lien he stands on the same footing as "laborers on logs," unless there is something in the act which gives him a better remedy. Counsel argue that the words "the said Tewksbury, his heirs and assigns," as employed in section 4, renders the right to a lien assignable. We think not. These words are employed several times in the act, and manifestly refer in each case to the franchise. Tewksbury may collect tolls on logs run by aid of the dams; or his assignee of the right to maintain the dams may do so; or his heir may do so, if Tewksbury die without having assigned the franchise. But we find nothing in the act which, by any authorized rule of construction, permits an assignment of the right to a lien. If the right to a lien was destroyed by the assignment of the claim, no argument is necessary to prove that the reassignment thereof to the plaintiff did not and could not revive it.

There are cases which hold the contrary doctrine, and maintain it with great force of reasoning; but the case of *Caldwell v. Lawrence*, sustained as it is by legislative construction, has stood unchallenged too long to be now lightly overruled. If a different rule is desirable, it should be enacted by the legislature. In the absence of legislative action, we must fol-

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low that case, and hold the general rule to be that the assignment of a claim for which the assignor might have a specific lien, before action, destroys the right to a lien.

2. The proposed amendment did not go to the cause of action, but only to the remedy. In *Lackner v. Turnbull*, 7 Wis., 105, an amendment was sustained which added to a prayer for a money judgment a prayer that such judgment be made a specific lien on certain real estate. The principle of the proposed amendment in the present case is the same. The amendment does not change the action from an equitable to a legal one. It was held in *Marsh v. Fraser*, 27 Wis., 596, that these lien suits are actions at law on contracts, notwithstanding they have some characteristics of suits in equity.

There seems no necessity here for circuity of action. No good reason is perceived why the rights of all parties may not be finally adjudicated in this action, and we think the refusal of the circuit court to allow the proposed amendment was not a proper exercise of its discretion.

By the Court.—The judgment is reversed, with directions to the circuit court to allow the amendment and award a new trial.

SMITH VS. LANDER.

February 24—March 9, 1880.

NEW TRIAL. (1) *When order granting or denying, reversed.* (2) *Costs of former trial.*

1. On a motion for a new trial upon the ground that the verdict is against the weight of evidence, the order of the circuit court, whether it grant or deny the motion, will not be reversed by this court, except where there was an abuse of discretion, or where the order appears to have proceeded upon an erroneous view of the law.
2. A new trial should not be granted on the ground above stated (where the verdict does not appear to have been perverse or corrupt), except upon terms of paying the costs of the former trial.

48	587
75	162
48	587
77	4
48	587
80	655
48	587
86	823
86	483
48	587
100	282

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APPEAL from the Circuit Court for *Pierce* County.

Action on a promissory note alleged to have been executed by defendant to F. L. Stevens or bearer, payable three months after date. The complaint avers that plaintiff is the lawful owner and holder of the note, and that default has been made thereon. The answer is, that the note was made payable to Stevens alone; that there was a certain contemporaneous agreement between Stevens and plaintiff as to the manner in which it might be paid; and that, after its delivery to Stevens, it was fraudulently altered by inserting the words "or bearer" after the name of the payee.

At the trial, plaintiff's objection to the introduction of any evidence under the answer, on the ground that it did not state any defense, was overruled. The court submitted to the jury the questions, whether the note was fraudulently altered as alleged in the answer, and whether, if so, defendant was guilty of negligence in executing the note in the shape in which he must have executed it if his testimony on that subject was true (i. e., with a blank space after the payee's name, in which the words "or bearer" might be written); the court stating that plaintiff appeared from the evidence to be an innocent purchaser.

After a verdict for the defendant, plaintiff moved for a new trial, on the grounds, among others, that the court erred in admitting evidence under the answer, and in submitting the question of negligence on defendant's part, and that the verdict was against the law and the evidence. A new trial was granted; and defendant appealed from the order.

The appeal was submitted on briefs of *Wellington Vannatta* for the appellant, and a brief of *Baker & Spooner* for the respondent.

For the appellant it was argued, among other things, 1. That as the evidence was conflicting, and nearly balanced, it must be presumed that no court would invade the province of the jury by setting aside the verdict merely because the judge, if

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sitting as a juror, would have rendered a different verdict. *Edmister v. Garrison*, 18 Wis., 603; *Van Doran v. Armstrong*, 28 id., 242; *Janssen v. Lammers*, 29 id., 92. 2. That if the new trial had been granted on the ground that the verdict was against the weight of evidence, it would have been only upon terms that plaintiff pay the costs of the former trial. *Emmons v. Sheldon*, 26 Wis., 648; *Carroll v. More*, 30 Wis., 574; *Pound v. Roan*, 45 id., 130. 3. That it must therefore be concluded that the new trial was granted for some supposed error of the court; and such supposed error was reviewable on this appeal. *Duffy v. Railway Co.*, 34 Wis., 188; *Seymour v. Colburn*, 43 id., 70; *Jones v. Evans*, 28 id., 168; *Bushnell v. Scott*, 21 id., 457. 4. That there was no error in refusing to charge the jury that defendant was guilty of negligence, but that question was properly left to the jury. Even where all the facts are undisputed, it is for the jury to determine what is reasonable care. *Langhoff v. Railway Co.*, 19 Wis., 490; *Dorsey v. Construction Co.*, 42 id., 583; *W. C. & P. R. R. Co. v. McElwee*, 67 Pa. St., 315; *Lancaster Bank v. Moore*, 78 id., 407; *Citizens' Ins. Co. v. Marsh*, 5 Wright, 586; *P. & C. R. R. Co. v. McClurg*, 6 P. F. Smith, 295; *Pa. R. R. Co. v. Barnett*, 9 id., 269; *Johnson v. Bruner*, 11 id., 58; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y., 455; *Hackford v. Railroad Co.*, 53 id., 654; *Gillespie v. Newburgh*, 54 id., 468; *Railroad Co. v. Stout*, 17 Wall., 659; *D. & M. R. R. Co. v. Van Steinburg*, 17 Mich., 99; *Rindge v. Coleraine*, 11 Gray, 157; *City of Rockford v. Hildebrand*, 61 Ill., 155; *Carsley v. White*, 21 Pick., 256. No man is bound to suspect another of forgery, and to provide against all possibilities of crime. *Briggs v. Ewart*, 51 Mo., 245; *Burson v. Huntington*, 21 Mich., 415; *Tisher v. Beckwith*, 30 Wis., 55; *Walker v. Ebert*, 29 id., 194. One is not liable on a forged promissory note, even in the hands of an innocent purchaser, even though the signature be genuine. *Nance v. Lary*, 5 Ala., 370; *Wade v. Withington*, 1 Allen, 561; *Fay v. Smith*, id., 477; *Ives v.*

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Farmers' Bank, 2 id., 236-241; *Sewall v. Boston Water Power Co.*, 4 id., 277-282; *Belknap v. Bank*, 100 Mass., 376; *Draper v. Wood*, 112 id., 315; *Greenfield Savings Bank v. Stowell*, 123 id., 196; *Waite v. Pomeroy*, 20 Mich., 425; *Holmes v. Trumper*, 22 id., 427; *Ivory v. Michael*, 33 Mo., 398; *Presbury v. Michael*, id., 542; *Washington Savings Bank v. Ecky*, 51 id., 272; *Goodman v. Eastman*, 4 N. H., 455; *Gerrish v. Glines*, 58 id., 9; *McGrath v. Clark*, 56 N. Y., 34; *Benedict v. Cowden*, 49 id., 396; 41 Barb., 465; *Wood v. Steele*, 6 Wall., 80; *Angle v. N. W. Ins. Co.*, 92 U. S., 333; *Knoxville National Bank v. Clark* (Sup. Ct. of Iowa), 1 N. W. Rep., N. S., 27.

For the respondent it was argued, 1. That this court will not interfere with the order of the court below granting or refusing a new trial, except where there has been a *gross abuse* by that court of its discretion (*Hoe v. Lockwood*, 3 Chand., 41; *State v. Lamont*, 2 Wis., 437; *Ford v. Ford*, 3 id., 399; *Schaeffler v. The State*, id., 823; *Cook v. Helms*, 5 id., 107; *Barnes v. Merrick*, 6 id., 57; *Zweig v. Horicon Mfg. Co.*, 14 id., 356; *Lewellen v. Williams*, id., 687); and that it would not have been such an abuse of discretion in this case if the court had granted a new trial expressly on the ground of a want of "clear and satisfactory evidence" of the fact of alteration, as to which the burden of proof was on defendant. *Kellogg v. Steiner*, 29 Wis., 631; *Lewellen v. Williams*, *supra*. 2. That the question of negligence on defendant's part, the facts being undisputed, was for the court (Wharton's Law of Neg., § 420, and cases there cited; 1 Redfield on R. W., 473; *Delaney v. Railway Co.*, 33 Wis., 72); and that the court should have held as matter of law, upon the evidence, that defendant, by his negligence in leaving the blank after the name of the payee, was estopped from alleging the alteration here claimed, as against a *bona fide* holder for value. 2 Daniell on Neg. Inst., § 1405, and authorities there cited; *Arnold v. Cheque Bank*, 18 Moak, 204 (1876); *Ingham v. Primrose*, 97 E. C. L., 82;

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Edwards on Bills, 2d ed., 416; *Zimmerman v. Rote*, 75 Pa. St., 188; *Chapman v. Rose*, 56 N. Y., 137; *Douglass v. Matting*, 29 Iowa, 498; *Winchell v. Crider*, 29 Ohio St., 480; *Citizens' National Bank v. Smith*, 55 N. H., 593; *Shirts v. Overjohn*, 60 Mo., 305.

TAYLOR, J. This is an appeal from an order of the circuit court granting a new trial upon the application of the plaintiff. The new trial appears to have been granted on the ground that the verdict was against the weight of evidence. The granting or not granting a new trial upon the ground that the verdict is against the weight of evidence is in nearly all cases a matter in the discretion of the trial court; and this court will not interfere with such order, whether granted or denied, unless it is clearly apparent that there was an abuse of discretion in making or refusing the order. And it is highly proper that it should be so. The learned judge who presides at the trial, and sees as well as hears the witnesses upon whose testimony the verdict is founded, is in a much better position to judge as to the fairness of the verdict than this court can be. His discretion, therefore, in granting a new trial cannot be interfered with, unless it clearly appears that there was no ground for granting the same, or that it was granted upon a mistaken theory of the law applicable to the case.

The cases in this court relied on by the learned counsel for the appellant for the reversal of this order, are all cases in which this court refused to reverse orders refusing to grant new trials; but the conclusion sought to be drawn from the language of the opinions in those cases, that because this court will not reverse an order refusing a new trial where the evidence is conflicting and there is some evidence to support the verdict, therefore an order granting a new trial will be reversed where the evidence is conflicting and there is evidence to sustain the verdict, does not follow. The order being

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to a great extent a discretionary order, this court will not interfere, no matter whether the order grants or refuses the new trial, unless it is apparent that there is an abuse of this discretion. *Van Valkenburgh v. Hoskins*, 7 Wis., 496, and cases cited in the opinion. See, also, the cases cited in the brief of the learned counsel for the respondent.

It is said by the learned counsel for the appellant, that this court ought to infer that the learned circuit judge granted the new trial for the reason that he had come to the conclusion that he had erred in instructing the jury on the question of negligence on the part of the defendant in executing and delivering the note in the manner in which he says he executed it, and as it is apparent that he did execute it, if his evidence is to be believed. We do not feel justified in making any such inference. We are of the opinion that the instructions of the learned circuit judge were sufficiently favorable to the plaintiff on this point. We entertain very grave doubts whether, if the note was executed and delivered by the defendant to the payee in the exact form it would have been if his testimony be true that the words "or bearer" were inserted after he delivered the same, and without his knowledge, there was any question of negligence on the part of the defendant either to be submitted to the jury or to be inferred as a matter of law. The authorities cited in the brief of the learned counsel for the appellant would seem to indicate that the evidence was not sufficient to raise the question of negligence on the part of the defendant; and certainly the facts proven are not such that the court could say, as a matter of law, that the defendant was guilty of such negligence in signing and delivering the note in the form he claims it was delivered, as to deprive him of the right to contest the question of its alteration in the hands of a *bona fide* holder without notice; but as it is unnecessary to decide that question on this appeal, we forbear any further comment upon it.

There is nothing in this record which shows that the learned

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circuit judge abused his discretion in granting the new trial in this case; but, as we must conclude that the new trial was granted in this case on the ground that the verdict was against the weight of evidence, and as it is not apparent that the verdict was so wholly unsupported by the evidence as to justify this court in holding that it was a perverse or corrupt verdict, according to the rule established by this court in the case of *Pound v. Roan*, 45 Wis., 129, and cases cited in the opinion, the order should have been granted upon terms of paying the costs of the former trial; and because it was not so ordered, it must be reversed.

By the Court.—The order is reversed, and the cause remanded with directions to the circuit court to order a new trial, on the terms that the plaintiff pay the taxable costs of the former trial.

THE BOARD OF SUPERVISORS OF ASHLAND COUNTY vs.
STAHL, imp.

February 24—March 9, 1880.

COUNTY. (1) *Liability for acts of district attorney.*

ATTACHMENT. (2, 3) *Remedy for wrongful attachment.*

1. Whether a county of this state is liable for damages, where the district attorney has attached property maliciously and without probable cause, in behalf of the county, *quære*.
2. For damages resulting from an attachment (against property) merely wrongful, without averment of malice or want of probable cause, the remedy in case of a discontinuance of the attachment suit was that prescribed by secs. 32, 34, p. 1476, Tay. Stats.; and not by an independent action, nor by counterclaim in a subsequent action by the county against the attachment debtor.
3. Whether, where the court immediately adjourned after the discontinuance of an attachment suit, in the absence of defendant's attorney, it could still enable defendant to have his damages assessed in the attachment suit under the statutory provisions above cited, is not here determined; but he has, at least, no other remedy.

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105	262

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APPEAL from the Circuit Court for *Ashland County*.

Defendant appealed from an order sustaining plaintiff's demurrer to a counterclaim set up in the answer. The nature of the counterclaim, and the grounds of the demurrer, will sufficiently appear from the opinion.

The cause was submitted on the brief of *John H. Knight* for the appellant, and on separate briefs of *W. M. Tomkins* and *H. N. Setzer* for the respondent.

For the appellant it was argued, among other things, that whenever a person unlawfully takes the property of another, and deprives the owner of its use and enjoyment, the law raises a promise on the part of the wrongdoer to compensate the owner for the value of the property or for the loss of its use; and the amount may be alleged as a set-off in an action *ex contractu* by the party liable therefor. *Norden v. Jones*, 33 Wis., 600, and cases there cited. The promise is implied from the facts, and need not be alleged. Bliss on Code Pl., 381; *Farron v. Sherwood*, 17 N. Y., 227; *Jordan, etc., v. Morly*, 23 id., 553; 31 Ind., 227; 34 id., 106; 22 Cal., 235. The remedy provided by statute is merely cumulative, no negative words being used to indicate that it was intended to be exclusive. *Farmers' Turnpike Road v. Coventry*, 10 Johns., 389; *Crittenden v. Wilson*, 5 Cow., 165; *Livingston v. Van Ingen*, 9 Johns., 507; *Renwick v. Morris*, 7 Hill, 575; *Lane v. Salter*, 51 N. Y., 1; *Goodrich v. Milwaukee*, 24 Wis., 422. In Alabama it has been held that an action on the case can be maintained by the defendant in an attachment suit against the plaintiff therein, for damages sustained from an unlawful taking of the property under the writ, although the attachment was resorted to without malice; and this upon the ground that, by the statute declaring the plaintiff's liability for damages by reason of the attachment, the legislature intended to make him liable for the taking and detention of the property, although without malice or corrupt motive (*Wilson v. Outlaw*, Minor, 367; *Kirksey v. Jones*, 7 Ala., 622);

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and the statutes of this state establish the same rule of liability.

For the respondent it was argued, among other things, 1. That the claim demurred to sounds in tort, and cannot be set up as a counterclaim in this action. R. S., sec. 2656; *Drake v. Cockroft*, 10 How. Pr., 377; *Edgerton v. Page*, 14 id., 125; *McCraney v. Alden*, 46 Barb., 272; *Culbertson v. Lennon*, 4 Minn., 51; *Folsom v. Carli*, 6 id., 420; *Akerly v. Vilas*, 21 Wis., 88. 2. That the statute provides an exclusive remedy for the alleged damages. R. S., secs. 2747-8. Where, as in New York for example, the statute merely requires a bond to indemnify the attachment defendant against damages resulting from the attachment, without any provision for the assessment of such damages, an action for the wrongful suing out of an attachment can be maintained, in the absence of malice, only on the bond. 1 Wait's Act. and Def., 428, and cases there cited; *Tallant v. Burlington Gas Light Co.*, 36 Iowa, 262. Our statute goes further, and provides for assessing the damages in the attachment suit; and this is the exclusive remedy, in the absence of malice. Dwarries on Stats. (Am. ed.), 275, note 5.

COLE, J. By his counterclaim the defendant *Stahl* seeks to recover damages for the wrongful seizure and taking of his real and personal property under the writ of attachment which was sued out in a former action commenced on behalf of the county on his official bond, by the district attorney. The ground of the attachment was, that *Stahl*, while acting as county treasurer, had fraudulently incurred an obligation to the county. It is stated that *Stahl*, by answer duly verified, denied the material facts contained in the affidavit of the district attorney for the writ of attachment; and that on the issue thus joined the circuit court found in his favor, dissolved the attachment and restored the property to his possession. Afterwards, it is alleged that the action was discontinued by the

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plaintiff because it had been prematurely commenced, and, within an hour after such discontinuance had been entered, and while defendant's attorney was absent from the court room, the court adjourned the term. In consequence of such adjournment, the defendant did not have the necessary steps taken to have adjudged to him the damages and losses which he sustained by reason of the attachment.

These are the material facts on which the counterclaim is founded. Now, several objections are taken on the demurrer to the counterclaim as set forth. It is said, (1) that the claim was one which must be first presented to the county board for allowance before suit could be brought upon it; (2) that no suit could be maintained for the damages resulting from the unlawful attachment unless that action was instituted maliciously and without probable cause, so as to amount to a tort, which would not be a proper counterclaim in this action; and (3) that the defendant's exclusive remedy for the damages was in the original attachment suit.

We will not attempt to determine definitely whether either of the first two points is well taken or not. The learned counsel for the defendant has referred to cases which hold that an action may be maintained by the attachment debtor for damages sustained where his property has been unlawfully attached or interfered with. In *Wilson v. Outlaw*, Minor (Ala.), 367, it is said that it is not necessary to prove malice in order to recover in such an action. In that case want of probable cause was alleged, and the decision is rested somewhat on the language in the attachment bond which was required to be given by statute. A serious doubt may be entertained whether this decision is not in conflict with the weight of authority in this country upon the subject; and it is noticeable that after it was made the legislature of that state enacted a law which provided that, when any attachment was wrongfully and vexatiously sued out, the defendant therein might have an action for the damages which he had

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sustained on account thereof, whether the attachment suit were ended or not. *Kirksey v. Jones*, 7 Porter, 622; see Drake on Attachments, ch. 39; Cooley on Torts, 187. In many of the states it is held that an action for an attachment maliciously obtained is governed by the principles of law applicable to a suit for malicious prosecution, and that it is essential that three things should concur or be established in order to maintain such action: namely, want of probable cause, malice in the attachment plaintiff, and damage to the attachment defendant. See Drake, above. In the light of these authorities it is manifest that the counterclaim is fatally defective if it really proceeds for damages for an attachment maliciously prosecuted; for surely there is no allegation of malice on the part of the district attorney in suing out the attachment, or want of probable cause.

But, without deciding, or even intending to intimate, that a county in this state could be subjected to damages in a case where the district attorney attached property maliciously and without probable cause, on behalf of the county, we will proceed to consider the facts out of which the counterclaim arises. And it is quite apparent, we think, when we examine them, that the ground of the action is for damages resulting from an attachment merely wrongful, where there was no element of malice or want of probable cause in the case. Now, for the recovery of damages on that ground, we are clearly of the opinion that the remedy of the defendant is in the attachment suit, and that an independent action cannot be maintained for them as is attempted to be done in the counterclaim. Our statute provides that before a writ of attachment shall be executed, a written undertaking on the part of the plaintiff, with sufficient surety, shall be delivered to the officer having the writ of attachment, to the effect that, if the defendant recover judgment, the plaintiff shall pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the writ of attachment, not exceeding the

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sum specified in the undertaking. Section 7, ch. 130, Tay. Stats. In subsequent sections of the chapter it is further provided, that, if the action be dismissed or discontinued, the court, upon the request of the defendant, may empanel a jury, which shall proceed to assess the damages sustained by the defendant by reason of the attachment, and the court shall render judgment thereon in favor of such defendant. Section 32. The defendant may issue an execution on such judgment, and may also commence an action on the plaintiff's undertaking, for the recovery of such judgment. Section 34. These provisions afford a complete and ample remedy to recover all damages for wrongfully suing out an attachment, and are exclusive in their character. And if upon common-law principles an action would otherwise lie upon the facts stated, we have no doubt that these provisions were intended to supersede or be a substitute for such action.

Nor does the fact that the court adjourned the term as soon as the attachment suit was discontinued, while the defendant's counsel was absent from the court room, tend in any way to strengthen or aid the counterclaim. The defendant's remedy, if any still remains to him, for the assessment of his damages in consequence of the attachment, is in that suit. Of course we express no opinion whether it is in the power of the court to enable the defendant to take the necessary steps in that cause to have adjudged to him his damages and losses, or not. That question is not now before us.

It follows from these views that the demurrer to the counterclaim was properly sustained.

By the Court. — Order affirmed.

Schwickerath, Adm'r, vs. Lohen.

SCHWICKERATH, Administratrix, vs. LOHEN.

February 24 — March 9, 1880.

48	599
116	1508

EQUITY: JURISDICTION: PLEADING. (1) *Jurisdiction of action for an accounting.* (2) *How objection to equitable jurisdiction must be taken.*

1. The complaint of an administratrix, for an accounting, alleges that defendant, as agent of plaintiff's intestate, received from the latter certain moneys to loan for him, and has not fully accounted therefor; and that plaintiff is not in possession of any books, papers or memoranda, by which the amount or the investment thereof can be ascertained. *Held*, that (notwithstanding the statute which supersedes the proceeding by bill in equity for a *discovery*, in aid of another action) the complaint states a good cause of action in equity.
2. After an answer in this action, accounting in part, and alleging a settlement, it was too late to object generally at the trial to the introduction of any evidence under the complaint, on the ground that the complaint did not state a cause of action within the equity jurisdiction of the court.

APPEAL from the Circuit Court for *Washington County*.

The cause was submitted on the brief of *Frisby, Weil & Barney* for the appellant, and that of *O'Meara & Miller* for the respondent.

For the appellant it was argued, 1. That equity has concurrent jurisdiction with law in all matters of account, and especially where the remedy at law is inadequate or doubtful. *Ludlow v. Simond*, 2 Caines' Cas., 1 (2 Am. Cas., 291 and notes); 1 Story's Eq. Jur., § 458 and note 1, and §§ 463-4; Willard's Eq., §§ 90-92, 104; *Hawley v. Cramer*, 4 Cow., 717, 726-7; *Southgate v. Montgomery*, 1 Paige, 41. This jurisdiction is not affected by the code. 4 Sandf. Ch., 682. Under our constitution, the legislature cannot take anything from the original or primary jurisdiction of equity, and give it to law. *Deery v. McClintock*, 31 Wis., 195. 2. That the objection that plaintiff has an adequate remedy at law, must be taken at the first opportunity, by answer or demurrer. *Tenney v. State Bank*, 20 Wis., 152, 163-4; *Boorman v.*

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Sunnuchs, 42 id., 233, 246-7; *Ludlow v. Simond*, *supra*; *Livingston v. Livingston*, 8 Am. Dec., 562; *Wiswall v. Hall*, 3 Paige, 313; *Le Roy v. Platt*, 4 id., 77; *Grandin v. Le Roy*, 2 id., 509.

For the respondent it was argued, 1. That before the statute, equity, having taken jurisdiction in a case like this for the purpose of a discovery, proceeded to decide the cause and grant full relief without turning the parties over to their remedy at law. *Chichester v. Vass*, 1 Munf., 98 (4 Am. Dec., 531); *Middletown Bank v. Russ*, 3 Conn., 135 (8 Am. Dec., 164); *Kearny v. Jeffries*, 48 Miss., 343. 2. That since actions for discovery have been abolished (R. S. 1858, ch. 137, sec. 55; R. S. 1878, sec. 1096), the proper practice in cases like this is that approved in *Williams M. & R. Co. v. Raynor*, 38 Wis., 132. See also *Riopelle v. Doellner*, 26 Mich., 102; *Glenny v. Stedwell*, 51 How. Pr., 329. 3. That, omitting from the complaint what relates to a discovery, plaintiff has an adequate remedy at law, and equity will not take jurisdiction. *Cone v. East Haddam Bank*, 39 Conn., 86; *Lafever v. Billmyer*, 5 W. Va., 33.

ORTON, J. This action, in the nature of a bill in equity, is brought by the executrix against the defendant as the agent of the intestate while living, who received certain moneys from him for the purpose of loaning the same, and has not fully accounted for the same, and the plaintiff is not in possession of any books, papers or memoranda by which the amount or investment thereof can be ascertained. The defendant answered, accounting in part, and alleging a settlement with the intestate. The circuit court dismissed the complaint on the objection of the defendant to the introduction of any evidence under it, on the ground that the complaint did not state a cause of action, or one within the jurisdiction of a court of equity.

The complaint appears to state a good cause of action; and

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the only real question is, whether the relief sought is within the jurisdiction of a court of equity. It is true that by the statute (section 55, ch. 137, R. S. 1858; section 4096, R. S. 1878) "no action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed;" but this does not affect the question of the jurisdiction of a court of equity in any proper case for an *accounting*. Whether the accounts between the parties are mutual or not, where a *discovery* is a necessary part of the accounting, as in this case, the jurisdiction of a court of equity is unquestionable. Willard's Eq. Jur., 91, and notes 24 and 28; 1 Story's Eq. Jur., § 458 and note 4, and § 463 and notes. This principle is elementary, and supported by uniform authority; and this case, as made by the complaint, is clearly within the principle.

After answer, and especially after such an answer, accounting in part and pleading settlement, the jurisdiction of the court is conceded, or at least objections to it must be deemed to have been waived. Such objection must be taken specially and as preliminary, by demurrer or answer, or it will be treated as waived. 1 Story's Eq. Jur., § 464; *Jones v. Collins*, 16 Wis., 594; *Tenney v. State Bank*, 20 Wis., 152; *Boorman v. Sunnucks*, 42 Wis., 233.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

 KNAGGS VS. GREEN.

February 24—March 9, 1880.

Mortgage of Infant: when binding.

A surety upon an infant's notes for purchase money of chattels, who has paid a judgment upon the notes, and received from the infant a note for the amount so paid, secured by mortgage of the same chattels, is entitled to hold the property as against a subsequent purchaser from the infant with knowledge of the mortgage.

48 601
86 380

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APPEAL from the Circuit Court for *Clark County*.

Replevin, for a span of horses. The material facts are stated in the opinion. The jury, by direction of the court, returned a verdict for the plaintiff; and, from a judgment thereon, defendant appealed.

The cause was submitted on the brief of *B. F. French*, as attorney, with *R. J. Mac Bride*, of counsel, for the appellant, and on that of *James O'Neill* for the respondent.

For the appellant it was argued, that an infant may disaffirm and avoid his chattel mortgage at any time before he becomes of age, and within a reasonable time thereafter (Tyler on Inf., etc., p. 69, § 30; Sehouler on Dom. Rel., 546; *Willis v. Twambly*, 13 Mass., 204; *Shipman v. Horton*, 17 Conn., 481; *Bool v. Mix*, 17 Wend., 119); that the sale and delivery of the mortgaged property to a third person is such a disaffirmance (Tyler, p. 70, § 31; *Chapin v. Shafer*, 49 N. Y., 407; *State v. Plaisted*, 43 N. H., 413; *Mustard v. Wohlford*, 15 Gratt., 329; *Skinner v. Maxwell*, 66 N. C., 45; *Derrick v. Kennedy*, 4 Port. (Ala.), 41; *Allen v. Poole*, 54 Miss., 323; *Dixon v. Merritt*, 21 Minn., 196; *Miller v. Smith*, 3 N. W. Rep., Nov. 8, 1879, p. 942); and that it is only where the infant is still in possession of the consideration when he comes of age, that he is required to return it as a condition of his right to disaffirm. Tyler, p. 78, § 37; *White v. Branch*, 51 Ind., 210; *Chandler v. Simmons*, 97 Mass., 508; *Gibson v. Soper*, 6 Gray, 279; *Boody v. McKenney*, 23 Me., 517; *Fitts v. Hall*, 9 N. H., 441; *Price v. Furman*, 27 Vt., 268; *Shaw v. Boyd*, 5 S. & R., 309; *Tucker v. Moreland*, 10 Pet., 65-74.

Respondent's counsel distinguished this case from those cited for the appellant, by the fact that here the mortgage was given not for an old debt but for the price of horses purchased by the infant; and he contended that Shurtleff could have enforced the mortgage upon default, unless the mortgagor returned the horses (*Heath v. West*, 28 N. H., 101; *Roberts*

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v. Wiggin, 1 id., 73; *Richardson v. Boright*, 9 Vt., 368; *Curtiss v. McDougal*, 26 Ohio St., 66; *Cogley v. Cushman*, 16 Minn., 397; *Callis v. Day*, 38 Wis., 643, 646; Herman on Chat. Mort., § 202); and that this plaintiff succeeded to Shurtleff's rights in that respect.

COLE, J. Both parties in this case claimed the horses in controversy through contracts made by George Field, a minor. The plaintiff claims under a chattel mortgage given by the minor under the following circumstances: One Shurtleff sold Field the horses for \$300. Field paid only \$200 down, and gave his note, signed by the plaintiff as surety, for the balance of the purchase money. When the note became due, Field was unable to pay it, and it was put into judgment. The plaintiff satisfied the judgment. Field then executed a note and chattel mortgage on the horses for the amount which the plaintiff had paid for him. This mortgage was duly filed in the town clerk's office where the horses were, and where Field resided. A few months after these transactions took place, while Field was a minor, he sold the horses to the defendant. It appears very clearly from the testimony of the defendant, that he knew when he purchased the horses that there was a mortgage on them; but he assumed that the mortgage was not good for anything, because executed by a minor. There is really no room for dispute about these facts, upon the evidence; and the circuit court directed the jury to find for the plaintiff. The inquiry is, whether that direction was warranted by the facts of the case. It is obvious that there are two conflicting titles to the property derived from the minor; and the question is, Which is to be preferred?

It is claimed on the part of the plaintiff, that his title should prevail; that because he, as surety, had to pay a part of the purchase money, he ought to be subrogated to the rights of Shurtleff, the vendor. It is argued that if Field had given a chattel mortgage on the horses to his vendor, to secure a

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part of the purchase money, he would not be allowed to avoid the mortgage on the ground of infancy, without rescinding the contract and restoring the property; consequently, that a purchaser from him, with full knowledge of the mortgage, should stand in no better position than the minor would have done in the case supposed. We are inclined to adopt this view as correct. It seems to us there could be no doubt, if Shurtleff had taken a mortgage on the horses from the minor to secure a part of the purchase money, that he could enforce it. For, as we understand, the law is well settled that an infant who has purchased personal property, and given a mortgage upon it to secure the purchase money, or a part of it, cannot avoid the mortgage under the plea of infancy, without rendering void the sale and losing his rights under it. *Heath v. West*, 28 N. H., 101; *Curtiss v. McDougal*, 26 Ohio St., 66; *Tyler on Inf.*, etc., 78.

In *Curtiss v. McDougal*, which is a case very much in point, the court say: "Without stopping to discuss the general disabilities or privileges of infancy, we hold that where an infant purchases a chattel, and at the same time, and in part performance of the contract of purchase, executes a mortgage on the purchased property to secure the payment of the purchase money, it is not within the privileges of infancy to avoid the security given without also avoiding the purchase. If, in such case, the infant would rescind a part, he must rescind the whole contract, and thereby restore to his vendor the title acquired by the purchase. The privilege of infancy may be used as a shield, but not as a sword; and, in such case, if the infant sells the mortgaged property, the purchaser takes it subject to the mortgage." In *Callis v. Day*, 38 Wis., 643, the same principle was applied to a purchase of real estate by infants, and giving back notes and mortgage for the purchase money. This court decided that the contract was not void but only voidable, and the fact that the infants retained possession of the property after reaching their majority was a

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ratification of the whole contract and made it binding upon them. See *Skinner v. Maxwell*, 66 N. C., 45; *Corey v. Burton*, 32 Mich., 30. The authorities cited on the brief of defendant's counsel certainly show that an infant may avoid a mortgage given for a precedent debt; but manifestly such a mortgage stands upon very different ground from one given for the purchase money.

It remains, then, to inquire whether the plaintiff, upon the established facts, can have the benefit of the principles of law which we have been considering. As a surety, as we have already observed, he paid a part of the purchase money of the horses. The chattel mortgage was given to him by the minor for the money so paid. It seems to us that the indebtedness so contracted should be treated, as it really was, as a debt for a part of the purchase money. If we look at the essence of the transaction, and not the form, this is what it amounts to. The plaintiff, therefore, is entitled to hold the property as against the defendant, who purchased of the infant with full knowledge of the existence of the mortgage. In other words, the defendant must be deemed, in the language of the court in *Curtiss v. McDougal*, to have taken the property subject to the mortgage. The plaintiff's title is the elder one, and has superior equities to support it. This view is decisive of the case.

The point made that there was no sufficient demand of the horses, and refusal, before the action was brought, seems to us too clearly untenable to require discussion.

By the Court. — The judgment of the circuit court is affirmed.

 Eilert vs. The Green Bay & Minnesota R. R. Co.

EILERT VS. THE GREEN BAY & MINNESOTA RAILROAD COMPANY.

February 24 — March 9, 1880.

RAILROADS: NEGLIGENCE: EVIDENCE. (1) *Court and jury.* (2) *Evidence that failure to signal near crossing was negligence.* (3) *Negative and positive testimony.*

1. In an action against a railway company for injuries received by plaintiff, from collision with a train, while driving his team and wagon across defendant's road, the court cannot say, as matter of law, that ordinary care required plaintiff to stop his team and listen for the train; or that trotting his team to within a rod of the track was negligence, even though he knew that the train usually passed the crossing at about that time in the day; but these questions are for the jury.
2. Evidence that, by reason of excavations, the formation of the land in the vicinity, and the presence of timber near the crossing, it was somewhat difficult for persons near it on the highway to see an approaching train, would support a finding by the jury that a failure to signal the approach of the train (by bell or whistle) was negligence, although such signals were not then required by *statute*.
3. Such a finding may be supported by mere *negative* testimony, notwithstanding positive testimony on defendant's part that signals were given. *Urbanek v. Railway Co.*, 47 Wis., 59.

APPEAL from the Circuit Court for *Jackson* County.

The plaintiff was driving his team and wagon in a public highway crossing the railway track of the defendant company in Clark county, and, as he was crossing the track, collided with a passing train. He received severe personal injuries, his horses were killed, and his wagon was broken by the collision. This action was to recover damages therefor. The complaint states the particular circumstances of the accident, and avers due care to avoid it on the part of the plaintiff, and the negligence of the defendant. The answer is a general denial, and a charge that the injuries resulted from the negligence of plaintiff. No question arose on the pleadings.

No instructions were proposed on behalf of the defendant, and no exceptions were taken to the charge of the court. The following extract from the bill of exceptions gives the verdict,

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and the circumstances under which the special questions were submitted to the jury:

"The court, at the request of defendant's counsel, made at the close of the testimony, directed the jury to find a special verdict; and the following questions were submitted to the jury, and answers made as follows, all of which questions were framed by defendant's counsel, and submitted to the jury at their request: '1. Was the bell rung and the whistle blown on that engine at the usual place before reaching the crossing? *Answer.* No. 2. Was the property and person of the plaintiff injured, on the day alleged, by the train colliding with the plaintiff's team crossing the track? *Answer.* Yes. 3. Had the plaintiff reason to expect the train along at the time he was approaching the track, and was he looking for it? *Answer.* Yes. 4. Did the plaintiff, on approaching the crossing, trot his team to within one rod, or a rod and a half, of the railroad track? *Answer.* Yes. 5. Did plaintiff, at any time after leaving the creek where he watered his horses, come to a full stop and listen for the train? *Answer.* No. 6. Was plaintiff familiar with that crossing, and the general lay of the ground about there? *Answer.* Yes. 7. If plaintiff had come to a full stop at any point within a reasonable distance of the crossing, and listened, could he have heard the rumbling of the train? *Answer.* No. 8. Was plaintiff prudent or careful in driving his team so near the track as he did, without stopping to listen for the coming train? *Answer.* Yes. 9. If you answer that the bell was not rung, and the whistle not blown, as the train approached the crossing that day, then answer this: Was the failure to sound the whistle or ring the bell the cause of plaintiff's accident? *Answer.* Yes.' The jury also brought in a general verdict as follows: 'We . . . find for the plaintiff, and assess his damages at the sum of \$1,443.'"

The court denied motions made in proper order on behalf of the defendant — *first*, for a nonsuit; *second*, for judgment

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in its favor on the special verdict; and *third*, for a new trial. From a judgment in favor of the plaintiff, defendant appealed.

The appeal was submitted on a brief of *Theo. G. Case*, as attorney, with *H. J. Huntington*, of counsel, for the appellant, and briefs of *R. J. MacBride* for the respondent.

LYON, J. We think the special findings are not inconsistent with each other, or with the general verdict for the plaintiff. One of those findings negatives any want of ordinary care on the part of the plaintiff in driving his team so near the railway track as he did, without stopping to listen for the coming train. The jury also found specially that the bell was not rung and the whistle blown on the engine at the usual place before reaching the highway crossing where the collision occurred, and that the failure to do so was the cause of the injuries complained of. There is no special finding that such failure was negligence; but that is necessarily included in the general verdict for the plaintiff. Under the charge of the court, which contains a clear and accurate statement of the law applicable to the case, and to which no exception was taken, the jury must have found that the failure to give those signals of danger at the proper time was negligence. Otherwise they could not have found for the plaintiff.

The jury having found that the injuries complained of were caused by the negligence of the defendant in failing to give the proper signals, and that the plaintiff was guilty of no negligence contributing thereto, the judgment cannot be disturbed unless we can say, either, *first*, that the evidence proves conclusively that the plaintiff was guilty of negligence contributing to produce such injuries; or, *second*, that there is no testimony tending to show that the injuries were the result of the negligence of defendant's employees operating the train in question.

1. We cannot say, as a matter of law, that ordinary care required the plaintiff to stop his team and listen for the train,

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or that the mere fact that he trotted his team to within a rod or a rod and a half of the track was negligence. These were questions for the jury. It was undoubtedly the duty of the plaintiff to watch for the train, which he knew usually passed the crossing about the time he reached it, and to approach the track with due and proper care, and the learned circuit judge so instructed the jury in the following pointed and emphatic language: "Danger is necessarily attendant upon the operation of railroad trains, and one may not carelessly expose himself to such danger; but care commensurate with the dangers reasonably to be apprehended is the duty of every person who is about to cross the track of a railroad. One about to cross a railroad track near the time when he should reasonably expect a passing train, must be careful, in order to avoid accident. He is bound to both look and listen, to learn whether the train is approaching. He must be alert with both eyes and ears; so much at least of care and caution common prudence requires of every person about to cross the railroad near the time when he may reasonably expect passing trains. Failing this, he is himself in fault; and if by such care he might have heard the approaching train, and avoided the accident, his fault helps or contributes to produce such accident as may happen to him. In that case he cannot recover for injuries which he may receive, although the proper signals have not been given of the approach of the train. If, by the use of reasonable, proper care and caution, by looking and listening, he might learn of the approaching train in time to avoid the accident, he cannot recover."

The plaintiff testified that he looked for the train just before he approached the crossing, and under the above instructions the general verdict for the plaintiff must be regarded as a finding that he did so, and that he used all reasonable and proper care to avoid the accident. It must be conceded that there is considerable testimony preserved in the bill of exceptions tending to show that the plaintiff was negligent; and for

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one I should be better satisfied with the verdict had it been for the defendant. But certainly there is testimony tending to show that the plaintiff exercised due care; and no act or omission on his part which we can say was negligence, is established by uncontroverted evidence. Under such circumstances, whatever may be our opinion as to which way the evidence preponderates, it is settled that the verdict cannot be disturbed.

In *Urbanek v. The Chicago, Milwaukee & St. Paul Railway Co.*, 47 Wis., 59, which was an action like this, the evidence and special findings showed that Urbanek drove his horses against a passing train in broad daylight; yet we found ourselves compelled by settled rules of law to hold, under the circumstances of the case, that we could not properly disturb a judgment in his favor, based upon a finding that he was in the exercise of due and proper care when injured.

2. When the plaintiff was injured, there was no statute, as there now is (R. S., sec. 1809), requiring the bell of the engine to be rung or the whistle sounded when crossing highways outside of cities and villages; yet many of these crossings are so situated that such signals of danger are absolutely essential to the safety of travelers on highways passing over the railway tracks, and the omission to sound the signals at such crossings is negligence. In this case there is testimony tending to show that, by reason of excavations, the formation of the land in the vicinity, and the presence of timber or brush near the crossing, there is some difficulty in seeing a train as it approaches the crossing. We think this testimony sufficient to support the finding that the failure to give the signals was negligence. We have already seen that the jury must have so found.

In *Urbanek v. Railway Co.*, *supra*, in which, as in this case, the injuries were received before section 1809, R. S., was enacted, the negligence found was the omission to whistle for the crossing before reaching it. The situation and surroundings of that crossing are not unlike those of the crossing where

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this plaintiff was injured. We sustained the finding in that case, and must do so in the present case.

The criticism that the testimony tending to prove the signals were not given is negative, while there is positive testimony that they were given, was made in the Urbanek case, and is sufficiently answered by Mr. Justice ORTON in the opinion in that case. His observations are directly to the point, and need not be repeated. It is sufficient to say that the testimony of the omission to give the signals, although negative in form, comes from persons in the neighborhood of the crossing where the accident happened, and is entitled to some weight. Hence it was proper testimony to be considered by the jury. The jury have found the omission to give the signals; their verdict is supported by the testimony; and this court cannot disturb it, merely because, as a general rule, positive testimony is entitled to more consideration than mere negative testimony.

By the Court.—The judgment of the circuit court is affirmed.

SAWYER VS. HANSON.

February 24—March 9, 1880.

Reformation of deed.

It appearing from the evidence that plaintiff agreed to sell and convey lands to defendants subject to the rights of W. and S., to whom plaintiff had sold all the pine timber on said land on condition that they should remove it within a specified time (which has not expired), and that the insertion of a clause to that effect in plaintiff's warranty deed to defendant was omitted through mutual mistake and inadvertence, the deed should be so reformed as to show that the conveyance was subject to the rights of W. and S. under said contract; but it was error to reform it by inserting an absolute reservation to plaintiff of all the pine timber on the land at the date of the deed, without fixing any time within which it should be cut and removed by plaintiff or his assigns.

APPEAL from the Circuit Court for *Clark County*.

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86 224

Sawyer vs. Hanson.

Defendant appealed from a judgment in plaintiff's favor.

The appeal was submitted on the brief of *R. J. MacBride* for the appellant, and briefs of *James O'Neill* for the respondent.

TAYLOR, J. This is an action to reform a warranty deed given by the plaintiff and respondent to the appellant, bearing date July 26, 1876, conveying to the appellant a certain tract of land therein described, without any exception or reservation whatever, and with full covenants of warranty. The complaint alleges that the agreement between the parties was that the pine timber standing and lying upon said lands should not be conveyed to the appellant, and that by a mistake of the person drawing the deed such reservation was omitted. The appellant denies the material allegations of the complaint. The case was tried by the court; and upon the evidence the court finds, as a matter of fact, that the agreement between the parties was that the pine timber upon the premises should be reserved, and that the exception or reservation was not inserted in the deed, through the mutual mistake and inadvertence of the parties. Without repeating or commenting upon the evidence given upon the trial, we have no hesitation in holding that the finding of the court below is fully and fairly sustained by the evidence; but we think the judgment makes the reservation broader than is justified by the finding or the evidence. The judgment makes an absolute reservation of all the pine timber on the land at the date of the deed, without fixing any time within which the same shall be cut and removed by the plaintiff or his assigns.

The evidence shows that on the 9th day of July, 1873, the plaintiff sold the timber on this land for \$1,250 to John Weston and Robert Schofield, with a condition that such timber should be removed within ten years from that date, otherwise said Weston and Schofield to lose all claim to said timber. The evidence also shows that the defendant knew of this sale of the

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timber before the execution and delivery of the deed to him, and that the agreement between them to reserve the timber in the defendant's deed was to protect Weston and Schofield in their claim to the timber, and to protect the plaintiff against the warranties in his deed.

The plaintiff himself testified on the trial, "It was my intention to convey to *Hanson* all the right and title I had in the land; that was the understanding between *Hanson* and myself." And again: "When I made the conveyance to *Hanson*, I intended to convey to *Hanson* all the right, title and interest I had in the land at that time." There is other evidence in the record, given by the plaintiff himself, that he did not intend to reserve to himself any interest in the land, or the timber growing thereon, after his conveyance to *Hanson*, and that the real intention of the parties was that *Hanson* should have a full title to the land and timber, subject only to the rights of Weston and Schofield under their contract with plaintiff.

Under this evidence it is clear that the plaintiff was not entitled to reserve to himself the absolute right and title to the pine on the land, but only such right to the pine as he had, by his written agreement with Weston and Schofield made in 1873, conveyed to them and their assigns. To have carried out this intention of the parties, the deed should, by the judgment of the court, have been so reformed as to have conveyed all right and title to the lands subject to the claim of Weston and Schofield to the pine timber under their contract with the plaintiff, bearing date July 26, 1873; or, if it was put in the shape of a reservation, it should have reserved to the plaintiff the same interest in the timber which he had, by his contract of July 26, 1873, conveyed to the said Weston and Schofield, and no other.

This mistake in the form of the judgment may prejudice the rights of *Hanson* under his deed. If the deed is corrected so as to carry out the intention of the parties, as clearly shown

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by the evidence, then *Hanson* will take the land and timber subject only to the right of Weston and Schofield, or their assigns, to cut and remove the same within ten years from July 26, 1873; but under the deed as reformed by the judgment of the court, *Hanson* acquires no right to the pine timber, either present or contingent. See *Strasson v. Montgomery*, 32 Wis., 53, and cases cited in the opinion, and *Rich v. Zeilsdorff*, 22 Wis., 544. And although the exact question has not been decided by this court, yet it is probable that the plaintiff might permit the trees to remain on the land for an indefinite period, to the great prejudice of the defendant, *Hanson*. *Howard v. Lincoln*, 13 Maine, 122; *Goodwin v. Hubbard*, 47 Maine, 595. The judgment must therefore be reversed, and a judgment entered in conformity with the true intent of the parties.

By the Court.—The judgment is reversed, and the cause remanded with instructions to the circuit court to enter judgment for the plaintiff in accordance with this opinion.

THE WISCONSIN RIVER LUMBER COMPANY VS. WALKER.

February 24—March 9, 1880.

EVIDENCE. (1) *Secondary evidence.* (2) *Material evidence of stock assessment.* (3) *Plaintiff's right to rebut testimony of defendant's witness given on cross examination.*

1. In an action wherein the plaintiff corporation was required to show a subscription to its stock by defendant, the facts having been shown that the stock book in which the subscriptions were made was not in the possession or under the control of the plaintiff, nor within the jurisdiction of the court, and that the person in possession thereof refused to deliver, exhibit or produce it upon plaintiff's demand, there was no error in permitting plaintiff to show by the testimony of its secretary, based upon his recollection, the contents of such book, relating to defendant's subscription.
2. The action being for the amount of an alleged assessment upon defendant's shares of stock, and the answer a general denial, and the record

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book of the meeting of the board of directors of the company, at which such assessment was made, being produced and identified by the secretary, his testimony as to what persons appeared by such record to have been present at the meeting, showing that all the directors were present, including the defendant, was *material* as well as competent.

3. Defendant, as a witness in his own behalf, having denied making certain admissions to which one of plaintiff's witnesses had testified, and having been *cross-examined* by plaintiff on that subject, it was competent for plaintiff thereafter to introduce evidence to contradict the statements made by defendant upon such cross examination.

APPEAL from the Circuit Court for *Portage* County.

Defendant appealed from a judgment in plaintiff's favor.

The appeal was submitted on the brief of *Raymond & Haseltine* for the appellant, and that of *G. W. Cate* for the respondent.

ORTON, J. This action was brought against the defendant, as a stockholder of the plaintiff, for an assessment upon his stock. The answer is a general denial; and, a jury having been waived, the trial was by the court, and the findings and judgment were for the plaintiff. By proper exceptions to the evidence and findings, the following questions were raised, which will be considered in their order:

First, as to the proof of the stock subscription. It was in evidence that the stock book in which the original subscriptions were made, was not in the possession or under the control of the plaintiff, but was in the personal possession of one Cronkhite, in the city of Chicago, state of Illinois, and of course beyond the jurisdiction of the court; and that the book had been demanded of him by the company, and he had refused to deliver it up, or to exhibit or produce it. The respondent, thereupon, offered to show and did show, against the objection of the appellant, by one Herron, the secretary of the company, the contents of the book, relating to such subscription of the appellant, from his recollection thereof. We think that under the rule laid down by this court in *Garrison*

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v. Owens, 1 Pinney, 544, and in *Bonner v. The Home Ins. Co.*, 13 Wis., 687, sufficient foundation had been laid for the introduction of this secondary evidence.

The testimony of Judge Cate, that the appellant admitted his subscription to the capital stock of the company, and that of Herron, that the appellant had talked with him about his having made such subscription, although contradicted by the appellant, would sustain the findings of the court upon this point without further evidence.

Secondly, as to the proof of an assessment, and call upon the capital stock, and notice thereof to the appellant. The witness Herron, the secretary of the company, testified: "I have the records of an assessment of the capital stock of the company, made January 27, 1877." He was then asked: "Will you show and state the persons who were present, of the board of directors, at the time of that assessment?" The counsel of the appellant "objected to the question on the ground that it is *immaterial*." The objection was not to the *competency* of the evidence. The objection was overruled, and the witness answered: "The minutes read, that there were present, President Davis, Messrs. Wadleigh, Wadsworth, Plumer and *Walker*. These gentlemen constituted the board of directors. These gentlemen were also stockholders." And he further testified: "The records show that on the 27th day of January, 1877, the following resolution was offered: '*Resolved*, That an assessment of twenty-eight per cent. be and is hereby levied on the capital stock of this company, the same being equal to seven dollars per share, payable at the office of this company at Stevens Point, within sixty days from this date, and that the secretary of this company be instructed to notify each and every stockholder of the action of this board. [Signed] W. C. Wadsworth.' On motion of Wadleigh, seconded by Plumer, it was adopted. [Signed] E. R. Herron." And he testified further: "*Mr. Walker* was present when the resolution was adopted. He was notified of the assess-

Slutts vs. Chafee and another.

ment after that; all of the stockholders were notified. The amount of the assessment on *Mr. Walker's* stock was \$1,400. No part of it has been paid."

This testimony was most certainly *material*, and we think competent also, and fully sustains the complaint and findings.

The next and only remaining question arose from the cross examination of the appellant himself, in respect to his denial of the admission which Judge Cate testified he had made to him, of his subscription to the capital stock of the company. The learned counsel of the appellant claims that the respondent, by such cross examination, made the appellant his witness, and that he was therefore bound by his testimony, and that such cross examination could not be made the foundation for his contradiction or impeachment. The case of *Smith v. Ehanert*, 43 Wis., 181, cited by the learned counsel in support of his position, is directly against it, and makes such testimony as was given in contradiction of the appellant's evidence upon such cross examination, clearly admissible.

By the Court.—The judgment of the circuit court is affirmed, with costs.

SLUTTS VS. CHAFEE and another.

February 24—March 9, 1880.

PLEADING: *Action held to be on contract: Nonsuit for nonjoinder of joint obligee.*

Complaint in justice's court, "that defendants are *indebted*" to plaintiff "in manner following: for a stove lent to defendants . . . of the value, etc., . . . which defendants have never returned to plaintiff, and refused to return when demanded." *Held*, an action *ex contractu*; and on proof (upon appeal to the circuit court) that the stove belonged to plaintiff and another person, as copartners, a nonsuit should have been granted.

APPEAL from the Circuit Court for *Portage* County.

48	617
59 LRA	624

Slutts vs. Chafee and another.

Defendants appealed from a judgment in favor of the plaintiff.

The appeal was submitted on the brief of *Raymond & Haseltine* for the appellants, and that of *G. W. Cate* for the respondent.

COLE, J. This action was commenced before a justice of the peace. The complaint was oral, and as entered in the docket of the justice was as follows: "Plaintiff complains that defendant is indebted to him in manner following: for a stove lent to defendants some time in 1870 or 1871, which stove was of the value of about \$45, and which defendants have never returned to plaintiff, and refused to return it when demanded; and demands judgment, with costs."

The answer of the defendants was a general denial, and that one S. J. Plummer was a copartner with the defendants, and should be joined as a defendant in the action; also the statute of limitations. Judgment was rendered by the justice in favor of the plaintiff, and the defendants appealed the cause. At the close of the testimony in the circuit court, the defendants moved for a nonsuit, which was denied and an exception taken. The learned circuit court, among other things, charged that the action was what in law was termed an action of trover, and this charge was excepted to. There was a verdict for the plaintiff. The real question arising on the record is, whether the court below was right in treating this as an action of tort, thereby rendering the joinder of Plummer unnecessary. Upon looking at the complaint, as we must do to determine this question, it seems to us it states a cause of action *ex contractu*.

The plaintiff alleges, or states, that the defendants are indebted to him for the value of the stove which he lent them, and which they have never returned. The word "indebted" is significant, for it is a legal term, having a legal meaning, and implies a debt presently payable. It was so defined by this court in *Troubridge v. Sickler*, 42 Wis., 417. It seems to us

 Bishop and another vs. Aldrich and another, imp.

that it is a forced and unnatural construction of the language of the complaint to assume or hold that it is for a wrongful conversion of the stove. Possibly the evidence introduced on the trial would sustain such an action, but that does not appear to be the gist or gravamen of the complaint; for, as we have said, the emphatic word used implies an obligation or duty springing from or arising upon contract. Great liberality in pleading is allowed in the justice's court; but surely a party ought to make it clearly manifest that he sues for a tort, when that is the cause of action. Suppose the defendants were arrested on a *ca. sa.* issued on the judgment, and imprisoned: would any court hesitate to declare such imprisonment unlawful, upon an examination of the complaint? It seems to us not. Now, if we are right in supposing the action was *ex contractu*, then it is apparent that Plummer should have been made a party defendant; and, because he was not brought in, we think there should be a new trial. It is true, the amount involved is inconsiderable; but we cannot affirm the judgment without a violation of legal principles.

By the Court. — The judgment of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

 BISHOP and another vs. ALDRICH and another, imp.

February 24 — March 9, 1880.

48	619
101	532
48	619
110	4669

EQUITY. (1) *Cancelling conveyance from parent to child, in consideration of maintenance.* (2) *Rights of grantee as to expenses already incurred.*

PRACTICE. (3) *Remedy for failure of complaint to set out instruments.* (4) *Terms of leave to answer on overruling demurrer.*

1. In 1875, plaintiffs, a married couple, old and infirm, conveyed the homestead farm to their daughter C., on the sole consideration that she should support and maintain them during the remainder of their natural lives; and at the same time the daughter executed to her father an instrument

Bishop and another vs. Aldrich and another, imp.

called in the complaint a "lease of said lands to hold the same during his life-time" and that of his wife, with a covenant to support them during their lives in a comfortable manner, and a provision empowering them, or either of them, upon breach of such covenant, to take possession of the premises and hold them for their support and maintenance. A few months afterwards, the daughter died; since that time plaintiffs have supported themselves; all the children and heirs-at-law of C., except one, are non-residents of this state, and "do not desire to carry out" C.'s agreement with plaintiffs, and that one is not of sufficient ability to do so. *Held*, that equity, at plaintiffs' suit, will cancel the conveyance to C. *Bogie v. Bogie*, 41 Wis., 209, and *Bresnahan v. Bresnahan*, 46 id., 985.

2. *It seems* that if, between the date of such conveyance and C.'s death, she expended for plaintiffs' support more than she received from them, the court may make her personal representative a party to the action, ascertain the amount, and require payment thereof as a condition of relief.
3. Plaintiffs' failure to set out the conveyance and lease or defeasance can be reached only by motion to make the complaint more definite and certain, and not by general demurrer.
4. On overruling such a demurrer, it was competent for the court to require defendants to pay ten dollars, in addition to the taxable costs of the order, as a condition of leave to answer.

APPEAL from the Circuit Court for *Portage* County.

This action was brought to procure the rescission of a conveyance of lands executed by the plaintiffs to their daughter, Eliza T. Carlton. The complaint, after alleging that the plaintiffs, being old and infirm, conveyed their homestead farm (describing it) to their said daughter, in April, 1875, in consideration that she should support and maintain them during their natural lives, proceeds as follows:

"And thereupon the said Eliza, for the purpose of securing to the plaintiffs the performance of the said agreement, on the said 13th day of April, 1875, made to the said *Levi Bishop* a lease of said lands, to hold the same during his life-time and the life-time of the said *Sarah Bishop*, wife of the plaintiff *Levi Bishop*, which said lease, signed by the said Eliza Carlton, contains the following provisions, to wit: 'That the said party of the first part, in consideration of the sum of \$2,500

Bishop and another vs. Aldrich and another, imp.

in hand paid by the party of the second part, does hereby agree and covenant to support the said *Levi Bishop* and his wife *Sarah Bishop* during their natural lives, in a good and comfortable manner, and to give them decent burial at their deaths.'

"And it was therein provided that if the said party of the first part, in the said lease, should at any time fail to provide for the said *Levi Bishop* and his wife *Sarah Bishop*, or either of them, in the manner hereinbefore stated, then the said *Levi Bishop*, or his wife *Sarah Bishop*, or either of them, may take full possession of the said premises and hold them for their support and maintenance. But the plaintiff alleges that the sole consideration of the said deed was the agreement of the said *Eliza* to support, maintain and provide for the plaintiff and his wife *Sarah* as aforesaid, and no money consideration whatever was paid or promised therefor."

The complaint further alleges the death of Mrs. Carlton during the same year; that the defendants are her children and heirs-at-law; that all of them, except *Lizzie Aldrich*, reside in New Hampshire, and do not desire to carry out their mother's agreement with the plaintiffs, and that said *Lizzie* is not of sufficient ability to do so; that if such heirs were willing and able to do so, the plaintiffs are not willing to continue the said agreement with them; and that since the death of Mrs. Carlton the plaintiffs have supported themselves.

The defendants *Lizzie* and *May Aldrich* demurred to the complaint on the ground that it fails to state a cause of action, and appealed from an order overruling their demurrer. The order gave the defendant leave to answer in twenty days, on payment of the costs of the order and \$10 attorney fees.

H. W. Lee, for the appellants.

G. W. Cate, for the respondents.

LYON, J. In *Bogie v. Bogie*, 41 Wis., 209, it was held, on principle and authority, that an entire failure to perform cov-

Bishop and another vs. Aldrich and another, imp.

enants for support and maintenance, which constituted the consideration for a conveyance, was sufficient to authorize a court of equity to rescind the conveyance. It would be useless to repeat here the reasoning, or again refer to the authorities, upon which the judgment in that case was based. The rule of *Bogie v. Bogie* was reasserted in *Bresnahan v. Bresnahan*, 46 Wis., 385, and must be regarded as the settled law of this state.

This case is not distinguishable in principle from those above cited. The covenants of Mrs. Carlton to support and maintain the plaintiffs were not assignable, and died with her. Her death, a few months after the conveyance, put an end to the obligation to maintain the plaintiffs; and, if the conveyance stands, her heirs would take the land conveyed to her, subject to the life lease, without any obligation on their part to perform her covenants. This would be most inequitable. The use of the property may or may not be sufficient to maintain the plaintiffs; but whether it is or not, the principle is the same. The consideration for the conveyance has failed, and, under the circumstances peculiar to cases of this class, the conveyance ought to fail with it.

The fact that Mrs. Carlton made a life lease (so called) of the land to the plaintiffs, is not important. That instrument is not strictly a lease, but a sort of defeasance, giving a right of entry only upon failure of Mrs. Carlton to perform her covenants. It is but a security for such performance, like the agreement in the *Bogie* case, or the bond and mortgage in the *Bresnahan* case, and does not affect the relief to which the plaintiffs would be entitled had it not been given. If Mrs. Carlton expended more for the support of the plaintiffs than she received from them during the few months that she lived after the conveyance was made to her, it is probable that the court may make her personal representative a party to the action, ascertain the amount, and require it to be paid as a condition of relief.

Lela and wife vs. Domaske and wife.

It is urged that the plaintiffs should have set out the conveyance, and lease or defeasance, in their complaint. Whether they ought to have done so is a question that cannot be determined on general demurrer. That defect (if it be one) can only be reached by a motion to make the pleading more definite and certain. The only question on this demurrer is, Does the complaint allege facts sufficient to constitute a cause of action? This question must be answered in the affirmative.

It was undoubtedly competent for the court to require the appellants to pay ten dollars in addition to the taxable costs of the order, as a condition to granting them leave to answer

By the Court. — Order affirmed.

LELA and wife vs. DOMASKE and wife.

February 24 — March 9, 1880.

Reversal of judgment, for inaccurate instruction.

A judgment will not be reversed merely because general terms were used in an instruction, which might have been made more definite and certain, where the appellant did not call the judge's attention to the point at the time, nor ask for more specific instructions (but merely took a general exception to the instruction), and the terms used, in view of the whole charge, could not mislead the jury.

APPEAL from the Circuit Court for *Portage County*.

The appeal was submitted on the brief of *Walter R. Barnes* for the appellants, and that of *G. W. Cate* for the respondents.

TAYLOR, J. This is an action to recover damages for an assault and battery alleged to have been committed upon the wife of *John Lela* by the wife of *Thaddeus Domaske*. The plaintiffs recovered in the court below. The defendants appeal to this court, and allege as error that the learned circuit judge misdirected the jury upon the question of damages. No exceptions were taken upon the trial, except those taken

Lela and wife vs. Domaske and wife.

to the instructions of the court to the jury upon the question of damages. The defense was, that the assault and battery was committed by the defendant in self-defense and in defense of her children. The appellants except to the charge of the learned circuit judge on the ground that it took from the jury the right to mitigate damages, provided they found that the respondent was the aggressive party and was actuated by malice. We are unable to hold that this exception is well taken. Upon this point the learned circuit judge charged the jury as follows:

"If the plaintiff did commence an assault upon the defendant, or upon her children, the law permits her to resist such assault, to protect herself and her children from an assault, and permits her to use all the necessary force that is requisite for such protection, but no more than is necessary for self-protection for herself and children. If, in fact, the plaintiff did commence the assault, and she resisted, and continued the use of force and blows after the plaintiff had quit making such assault—followed it beyond what was necessary for self-protection,—she would become liable for damages resulting from all force used beyond what was necessary for self-protection of herself and children. And in this case, if you find that the plaintiff commenced the attack, it is to be taken into consideration in mitigation of damages, even though you find that the defendant went beyond what the law permits for self-protection. . . . In assessing damages in actions of this kind, a distinction exists, always has, and forever should, between an unprovoked and unjustifiable assault, and one that is brought on by aggravating language, menaces and threats, that are calculated to stir up the passions. And, in this case, if you find that the assault was commenced by the defendant without provocation therefor, an abatement should not be made from the amount that you find the plaintiff should be entitled to as full measure of damages for an unprovoked and unwarrantable assault."

Lela and wife vs. Domaske and wife.

It seems to us that the part of the charge of the learned circuit judge above quoted clearly says to the jury, that if they find that the plaintiff commenced the assault or provoked the attack by the defendant, such fact should be taken into consideration by the jury in mitigation of the plaintiff's damages; and that in this respect the charge, if erroneous at all, is so because it is too favorable to the defendant. It would have justified the jury, if they found that the plaintiff had provoked the attack, in mitigating the actual compensatory damages of any kind which, under other circumstances, she would have been entitled to recover, and is in conflict with the rule laid down by this court in the case of *Wilson v. Young*, 31 Wis., 574, which holds that any provocation on the part of the plaintiff in an action of this kind, which does not legally justify the assault by the defendant, cannot be considered in mitigation of any compensatory damages, except such as may in a proper case be recovered for an injury to the plaintiff's feelings, or, in other words, for mental suffering.

The learned judge follows that part of his charge above quoted by a statement that the plaintiffs in this action can only recover for the personal injuries to the wife, for her pain and suffering both of body and mind, and nothing else; and expressly directs the jury that they cannot assess any punitive damages under any view of the case which may be taken by them. This the learned counsel for the appellants admits was erroneous, but was an error committed in favor of the appellants, and of which they cannot therefore complain. Then follows that part of the charge to which special exception is taken, which is as follows:

"So that what you give here is this: The amount that you feel and determine that, under all the circumstances, should be given to her for the injury suffered, for the bodily pain endured, and for the amount of suffering and anguish; and that constitutes just such sum as, under all the circumstances, you say she ought to receive for it. In actions of this kind dam-

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ages cannot be measured in dollars and cents by proof of what it is worth, like property, because health is inestimable. Pain cannot be measured by money, by dollars and cents, by proof of how much it was worth to endure such an agony for such a length of time. Neither can the amount of anguish be the subject matter of proof in dollars and cents. But still, on that account, for the very reason that it can't be measured by proof in dollars and cents, it is left to the jury to say what should be the amount awarded, taking everything into consideration. And that covers, gentlemen, the ground of inquiry, and the rule of damages that you should use in measuring it. The plaintiffs are entitled to recover for such damages as you think ought to be awarded for the injury that was inflicted upon her — the pain she endured of body and mind."

The appellants excepted to this part of the charge, "for the reason that it directed the jury to find any amount of damages which they saw fit to find." It is urged by the learned counsel, that this instruction directed the jury to find damages as they thought just, irrespective of the evidence in the case. We do not think the charge is subject to this criticism. The learned judge says: "The jury are to determine the amount of damages which the plaintiff ought to receive under all the circumstances; and because proof cannot be given as to how many dollars and cents it is worth to suffer pain and anguish for a definite period, it is left to the jury to say what amount shall be awarded to the plaintiff, taking everything into consideration. The plaintiffs are entitled to recover such damages as you think ought to be awarded for the injury that was inflicted upon her — the pain she endured of body and mind." This is the substance of the part of the charge excepted to. We think the qualifying words, "under all the circumstances," and "taking everything into consideration," must have been understood by the jury as the "circumstances" and "things" which had been presented to them by the evidence

Lela and wife vs. Domaske and wife.

on the trial, and nothing else. They could not have been misled, by this general use of the terms "circumstances" and "things," into the belief that they were at liberty to take into consideration circumstances and things which had not been presented to them by the evidence. The jury could not but remember that they had been sworn to decide the case upon the law and evidence given in court, and would understand these general words as applicable to those matters which had been brought to their knowledge by the evidence produced upon the trial, unless it clearly appeared that the learned judge intended to include other matters.

It might be urged that the exception is too general to raise the point that the jury might have been misled because the learned judge did not further qualify the general words used, by stating that in estimating the damages they should consider only the circumstances and things disclosed by the evidence. The instruction is not excepted to for that reason, but for the reason that it directed the jury to find any amount of damages they saw fit. The instruction is clearly not subject to this criticism, unless it be construed to be an instruction to find such damages as they saw fit without regard to the evidence in the case. We have said we do not think it subject to this criticism; and, if the appellants thought it might be so understood by the jury, we think that fact should have been called to the attention of the court at the time, so that, if there was any chance for a misunderstanding by the jury as to the meaning of the instruction, they could have been set right at once.

As we are quite clear that the jury could not have been misled by the general terms used by the learned circuit judge, we cannot reverse the judgment because it might have been made more definite and certain, and probably would have been if the attention of the learned judge had been called to the point now made, at the time his instructions were given.

We do not think the charge is subject to the objection that

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it in effect directed the jury to find for the plaintiffs. In the first part of his instructions, the judge had stated that under certain circumstances the plaintiffs would not be entitled to recover; and his instructions as to the damages the plaintiffs might recover were all given subject to the previous instructions, that, if they found that the plaintiffs made the first assault, and the defendant used no more force than was necessary to protect herself and resist the assault, the plaintiffs could not recover. The jury could not have been misled upon this question by anything which was said in the instructions of the learned circuit judge upon the question of damages.

By the Court.—The judgment of the circuit court is affirmed.

JENKINS and another vs. McCURDY.

February 24—March 9, 1880.

(1, 2) *Realty or personalty?* (3) *Reversal for error of fact.*

1. What is in its nature, otherwise, personal property, nevertheless, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title to the realty.
2. While "slabs, sawdust, shavings and other refuse matter, used to fill up low and marshy ground," may be a part of the realty, "slabs and pieces of lumber suitable for firewood, piled up on the premises and intended to be used and removed as such," are personal property.
3. A judgment supported by the special findings of fact, in an action tried by the court alone, will not be reversed unless there appears to be a clear preponderance of evidence against such findings.

APPEAL from the Circuit Court for *Portage County*.

Plaintiffs appealed from a judgment in defendant's favor.

The appeal was submitted on the brief of *Finch & Barber* and *W. R. Barnes* for the appellants, and that of *G. W. Cate* for the respondent.

ORTON, J. This action is brought to enjoin the defendant from entering upon the lands of the plaintiffs and removing

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earth or certain filling material, which had become part of the soil, and for the value of such material which has been thus removed. The defendant, by his answer, admits his entry upon the lands of the plaintiffs and removal of certain material therefrom, which he insists had not become a part of the soil or attached to the freehold, but consisted of fire-wood, piled up and so placed upon the premises as to be personal property, and that he was the owner of the same, and had the right to so enter upon the premises of the plaintiffs and remove it. This case involves the small amount of about nine dollars, and only one question, which is a mixed one of law and fact, and depends entirely upon the facts in proof, and will therefore be but briefly considered.

It appears that the plaintiffs purchased the premises of one Thompson; that at that time the material in question was upon the surface of the soil, either as fire-wood or filling; and that afterwards Thompson sold said material to the defendant, and the defendant entered the premises and removed a part of such material therefrom. The character of this material in its nature and uses, its situation upon the land as being actually and physically attached or detached, and the intention of the owner when it was so placed in respect to its use, are questions of fact necessary to be considered in determining the question of law as to whether this material had become a part of the realty, and passed by deed to the plaintiffs, or whether it was personal and movable property, and was sold to the defendant, and he thereby became the owner. The facts agreed upon, the questions of law are neither difficult nor doubtful. That which is in its nature otherwise personal, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title of the realty. Tyler on Fixtures, 59, 116; Ewell on Fixtures, 31; *Conklin v. Parsons*, 2 Pinney, 264.

The only question in this case is, Does the evidence show the material to have been "slabs, sawdust, shavings and other

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refuse matter" used to fill up low and marshy ground near the mill, as claimed by the plaintiffs, or slabs and pieces of lumber suitable for fire-wood, and piled up on the premises and intended to be used and removed as such? On this question depends the legal conclusion that the material in question is, or is not, personal or real property; and on this question the evidence is conflicting and contradictory. The circuit court found that the facts justified the conclusion that the material was personal property and belonged to the defendant, and made a special finding of the facts upon which such conclusion was based. Against these findings there does not appear such a clear preponderance of the evidence as would warrant us in reversing them. *Green v. Feil*, 41 Wis., 620, and numerous other cases in this court, make this the true test for the exercise of this right by this court.

By the Court.—The judgment of the circuit court is affirmed, with costs.

 CADLE and others vs. McLEAN.

February 24 — March 9, 1880.

CONTRACTS: Cutting and manufacturing timber. (1) *What instruments to be filed with lumber inspectors.* (2) *Contract as to cutting, removing and manufacturing timber, construed.*

1. Sec. 19, ch. 42, Tay. Stats. (p. 757), refers to mortgages and other instruments affecting title to logs already cut and marked when such instruments are executed, and not to sales or mortgages of standing timber.
2. By the terms of a written instrument, defendant sold T. & Co. all the merchantable pine timber standing on certain lands; T. & Co. were to place a certain mark on the end of each piece of timber cut, and to cause the timber to be manufactured into lumber and shingles, but were not to sell or otherwise dispose of any timber or lumber manufactured therefrom until the purchase money should be paid; the rights of property in and possession of the timber and lumber were to remain in defendant until such payment; and he had full power to take possession

48	630
78	206

48	630
90	630

48	630
109	89

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and sell, on notice. *Held*, that the contract was either a conditional sale of personal property by defendant, or a chattel mortgage to him, taking effect as the timber was cut; and in either case the filing of the instrument in the proper clerk's office without recording it in the registry of deeds, was sufficient (under ch. 113 of 1873, or Tay. Stats., 769, sec. 3), to protect defendant's rights against a subsequent purchaser from T. & Co.

APPEAL from the Circuit Court for *Portage* County.

Replevin, for lumber. On the 17th of June, 1878, *McLean* and the firm of Thompson & Co., of Stevens Point, entered into a written contract whose provisions are thus stated by Mr. Justice COLE: "The defendant sold Thompson & Co. all the merchantable pine standing on the land named, for a sum to be paid as specified. Thompson & Co. were to mark on the end of each log or stick of timber cut on the land a certain mark. They were to cause the timber to be manufactured into lumber and shingles at Stevens Point, or some other point on the line of the railroad, and were not to dispose of any timber or lumber manufactured therefrom, until the purchase money was paid, without the consent of the defendant. And it was expressly agreed that the right of property and the right to the possession of the timber and lumber thus manufactured, should remain in the defendant until the purchase money was paid; and [in case of any failure to make payment, or in case defendant should at any time feel himself insecure], defendant had power to take possession of and sell the timber and lumber at public or private sale, upon giving ten days' notice." This agreement was filed in the office of the city clerk of Stevens Point in August, 1878.

Under this contract, Thompson & Co. cut the timber from the land, between the last of July and the 7th of November, 1878, shipped the logs to Stevens Point, and there had them sawed into lumber, with defendant's knowledge. On the 10th of October, 1878, Thompson & Co. entered into a contract with the plaintiffs, by which the former agreed to

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manufacture for the latter, and plaintiffs agreed to purchase, a quantity of lumber from said logs. On the 6th of November following, Thompson & Co. delivered to plaintiffs nearly 400,000 feet of lumber so manufactured, and received from them payment therefor. Plaintiffs had no actual notice or knowledge of defendant's rights in respect to the lumber, until November 28, 1878. About the 5th of December following, defendant took possession of said lumber to secure payment of a part of the purchase money which had become due on the first of that month and remained unpaid. After due demand and refusal of the lumber, plaintiffs brought this action to recover possession thereof.

By direction of the court, a verdict was returned for the defendant; and, from a judgment on the verdict, plaintiffs appealed.

The cause was submitted for the appellants on the brief of *Wm. H. Packard*, their attorney, with *Walter R. Barnes*, of counsel; and for the respondent on the brief of *G. W. Cate* and *A. Eaton*.

For the appellants it was contended, 1. That under the contract Thompson & Co. took an interest in the real estate (*Young v. Lego*, 36 Wis., 394; *Warner v. Trow*, id., 196; *Strasson v. Montgomery*, 32 id., 52; *Daniels v. Bailey*, 43 id., 566); and that so much of the instrument as granted or reserved rights to the defendant, also affected the realty, and should have been recorded in the registry of deeds. *Wescott v. Delano*, 20 Wis., 514; *Frankland v. Moulton*, 5 id., 1; *Vorebeck v. Roe*, 50 Barb., 302; *Farmers' L. & T. Co. v. Hendrickson*, 25 id., 484; *Warren v. Leland*, 2 id., 613; *Goodyear v. Vosburgh*, 57 id., 243; *S. C.*, 39 How. Pr., 377; *Potts v. N. J. Arms Co.*, 17 N. J. Eq., 395; *Johnson v. Moore*, 28 Mich., 3; *Driscoll v. Marshall*, 15 Gray, 62; *Sterling v. Baldwin*, 42 Vt., 306. 2. That Thompson & Co. were either mortgagors of real estate in possession or vendees in possession, and in either case were legal owners of the timber

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as fast as cut; and defendant could not maintain replevin against their *bona fide* vendees. *Beckwith v. Philleo*, 15 Wis., 223; *Northrup v. Trask*, 39 id., 515; *Andrews v. Jenkins*, id., 476; *Martin v. Scofield*, 41 id., 167; *Marsh v. Bellew*, 45 id., 36; *Ortman v. Shaw*, 37 Mich., 448; *Wilson v. Maltby*, 59 N. Y., 126. 3. That at all events, under the contract and the acts of the defendants Thompson & Co. had a license to enter and cut the timber, and the legal right to it passed to them (*Gillet v. Treganza*, 6 Wis., 343; *Marsh v. Bellew*, *supra*; *Buck v. Pickwell*, 27 Vt., 157-166; *Owens v. Lewis*, 46 Ind., 489; 1 Sugden on Vend., 8th Am. ed., 183, note n; 1 Chitty on Con., 11th Am. ed., 416, note j); and if the licensor would protect himself from this usual result, he must (at least as to third persons without notice) protect himself by registry. 4. That if, by virtue of the intent to sever from the realty, the subject matter of the contract be regarded as personalty, still the instrument is in effect a chattel mortgage by T. & Co. to the defendant; and, being of property to be acquired, is void. To the point that the instrument was a mortgage, counsel cited *Andrews v. Jenkins*, *supra*; *Musgat v. Pumpelly*, 46 Wis., 660; *Hurd v. Brown*, 37 Mich., 484; *Gibson v. Eller*, 13 Ind., 124; *Johnson v. Crofoot*, 53 Barb., 574; *Coe v. Cassidy*, 72 N. Y., 133, 137; *Fessler's Appeal*, 75 Pa. St., 483; *Morrow v. Turney*, 35 Ala., 131; *Woodman v. Chesley*, 39 Me., 45; *Herman on Chat. Mort.*, 47, 54. If the transaction was a mere conditional sale, then, on nonperformance of the conditions, the rights of the vendees might be declared forfeited, and the title to the property be again absolute in the vendor; but, to accomplish this, defendant must have given notice to T. & Co., must have rescinded the contract *in toto*, and must have restored those parties to their former status. *Giddey v. Altman*, 27 Mich., 206; *Deyoe v. Jamison*, 33 id., 34; *Cushman v. Jewell*, 14 N. Y. Sup. Ct., 525; *Keogh v. Daniell*, 12 Wis., 164. By not doing this, but virtually pro-

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ceeding as for his debt, defendant has recognized the transaction as a sale to T. & Co., with a chattel mortgage back to him of the logs to be cut from the growing timber of the mortgagors. Such a mortgage is void. *Single v. Phelps*, 20 Wis., 398; *Mowry v. White*, 21 id., 417; *Hunter v. Bosworth*, 43 id., 583. 5. That, whether the contract is a mortgage or a conditional sale, the instrument is one affecting the ownership of marked logs, and, to operate as notice in favor of one out of possession, must be recorded with the lumber inspector of the district. *Tay. Stats.*, 757, § 19; *McCutchin v. Platt*, 22 Wis., 561; *Kimball v. Post*, 44 id., 476; *Herman on Chat. Mort.*, 158-9. 6. That even if it should be held that the transaction was a conditional sale, and that no record of it was necessary in any place, still, defendant having parted with the possession to apparent owners, a sale by them to *bona fide* purchasers would pass the title as against defendant. 1 *Parsons on Con.*, 6th ed., 538; 1 *Chitty on Con.*, 11th Am. ed., 534; 1 *Smith's L. C.*, 6th ed., 1093; 11 *U. S. Dig.*, p. 861, sec. 494, and cases there cited; *Rice v. Cutler*, 17 Wis., 358; *Smith v. Lynes*, 5 N. Y., 41; *Crocker v. Crocker*, 31 id., 507; *Wait v. Green*, 36 id., 556; *Lewis v. Palmer*, Hill & Den., 68; *Steelyards v. Singer*, 2 Hilt., 96; *Rawls v. Deshler*, 4 Ab. App. Dec., 12; *Mich. C. Railroad Co. v. Phillips*, 60 Ill., 190; *Young v. Bradley*, 68 id., 553; 13 id., 610; 21 id., 330; *Goodwin v. Railroad Co.*, 111 Mass., 487; *Boynton v. Libby*, 62 Me., 253; *Vaughn v. Hopson*, 10 Bush, 337; *Dudley v. Abner*, 52 Ala., 572. These cases proceed upon the equitable doctrine, that where one of two innocent persons must suffer, he must bear the loss who has made it possible; and upon the further equitable doctrine, that secret liens upon chattels by one out of possession are not favored, but are against the policy of the law. *Blakeslee v. Rossman*, 43 Wis., 123.

For the respondent it was argued, 1. That this was not a contract or instrument in any way affecting the ownership of any mark of logs, but was a conditional sale of standing tim-

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ber, and all else in the writing was a means of identifying the timber when it should be removed, to enable the vendor to follow it and enforce payment. If the writing transferred anything to the vendees, it was an interest in the land upon which the timber stood. *Young v. Lego*, 36 Wis., 394; *Daniels v. Bailey*, 43 id., 566. The provisions of the revised statutes relating to the marking of logs, etc., were designed to apply to logs, etc., intended to be driven to market, or to the place of manufacture, in the waters of this state, where logs of different owners are inevitably mixed together, and the only means of separation is by the marks upon them. See secs. 1740, 1747. These provisions should not be held to apply to logs or timber carried by railroad from the place of cutting to the place of manufacture, and constantly in the actual possession of the owner. 2. That all the provisions of the contract relating to the enforcement of payment (if they have any effect in view of the express reservation of the right of property and possession to defendant), amount to nothing more than an agreement that, in case of nonpayment, the contract shall be treated as a *chattel mortgage*. 3. That if the contract was a mere *conditional sale* of personal property, the title and possession to remain in the vendor until payment of the purchase price, then the filing of the contract in the proper clerk's office was sufficient to protect defendant's interest against any sale by Thompson & Co. R. S., sec. 2317; *Hunter v. Warner*, 1 Wis., 141; *Aultman v. Mallory*, 25 Am. R., 478; 12 id., 187, 663.

COLE, J. It seems to us there is no foundation for the claim that the contract between the defendant and Thompson & Co. was one which the statute contemplated should be filed and recorded in the office of the district lumber inspector, in order to be valid as against the plaintiffs. The statute (sec. 19, ch. 42, Tay. Stats.) undoubtedly refers to the sale and transfer of logs which are cut, having upon them a recorded

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mark which distinguishes them from other logs. This is very apparent from the preceding section, which provides that the owner of logs may use on his logs any mark not before used by any person in his lumber district, and this mark shall be recorded in the office of the district lumber inspector. Then comes the provision for recording all mortgages, bills of sale or other instruments in any way "affecting the ownership of any mark of logs" in the inspector's office, provided the instrument specifies "*the marks placed upon the logs, and where they were cut.*" It is evident that, by a kind of figure of speech, the language "ownership of any mark," etc., represents the ownership of the marked logs themselves. The statute evidently refers to a transfer of logs which are already cut, having a recorded mark upon them, and has no application to a sale or mortgage of standing timber thereafter to be cut into logs. A bare reading of the statute is deemed sufficient to show the correctness of this construction without further remark.

But the learned counsel for the plaintiffs insists that the contract had for its subject matter real estate; that it created between the parties thereto either the relation of vendor and vendee, or of mortgagee and mortgagor; and that, as there was a change of possession in fact of the timber, or of the logs made therefrom, it was necessary that the defendant, in order to preserve his rights under the contract as against the plaintiffs, should have had the instrument recorded in the office of the register of deeds. The contract was in fact filed in the office of the city clerk of Stevens Point, where Thompson & Co. resided, August 23, 1878. It is true this court has decided that a sale of standing timber was a sale of an interest in land within the statute of frauds (*Strasson v. Montgomery*, 32 Wis., 52; *Warner v. Trow*, 36 Wis., 196; *Young v. Lego*, id., 394; *Daniels v. Bailey*, 43 Wis., 566); but it does not follow from this that it was essential that defendant should record his contract in the office of register of deeds in order

to preserve his rights. We have not been referred to any statute which requires that such an instrument should be recorded as a conveyance, to secure the rights of parties to it.

Suppose the contract had been that Thompson & Co. were to cut the standing timber on the land and manufacture it into lumber on shares, the title of the property to remain in the defendant until the lumber was equally divided. There could be no doubt in that case that the defendant would hold the lumber until a division was made, even as against a purchaser from Thompson & Co. But if we refer to the terms of the contract, we find that the intention of the parties seems to have been to make a conditional sale of the standing timber — the title to remain in the vendor until the consideration was paid, — or, what is more probable, to make the instrument operate as a mortgage of personal property, which would take effect as such as and when the timber was cut and severed from the freehold. Consequently, whether the instrument be treated as a conditional sale of the standing timber and coming within the purview of chapter 113, Laws of 1873, or in the nature of a chattel mortgage within the meaning of section 3, ch. 45, Tay. Stats., taking effect as the timber was severed from the freehold, seems to be quite immaterial, because the result is the same, the instrument being filed in the proper office. The contract evidently intended that the right of property and the right of possession in the timber cut should remain in the defendant until payment of the purchase money. Within the doctrine of *Clafin v. Carpenter*, 4 Met., 580, and *Douglas v. Shumway*, 13 Gray, 498, the contract might be sustained as a mortgage of personal property, taking effect when the timber was cut. It is, perhaps, the most unfavorable view for the defendant to treat the contract as being in the nature of a mortgage of personal property, as it doubtless was intended it should be. But, in whatever aspect the case is considered, we think the charge of the learned circuit court was correct, that the defendant could hold

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the lumber as against the plaintiffs, the vendees of Thompson & Co.

It follows from these views that the judgment of the circuit court must be affirmed.

By the Court. — Judgment affirmed.

LAUER and others vs. BANDOW, imp.

February 24 — March 9, 1880.

Several actions or judgments against joint debtors.

1. Judgment against one of several merely *joint* debtors is a bar to a subsequent action against the others, the debt being *merged* in the judgment. *Bowen v. Hastings*, 47 Wis., 232.
2. In an action against husband and wife to enforce a mechanic's lien for the erection of a building on the wife's lot, a personal judgment was obtained against the husband alone, and a lien adjudged upon the wife's house and lot. After reversal of *the latter part* only of the judgment, the circuit court, on affidavits tending to show merely a joint liability of the wife with the husband, without vacating the personal judgment against the husband, permitted the complaint to be amended so as to allege the wife's personal liability, and granted a new trial. *Held*, error.

APPEAL from the Circuit Court for Portage County.

This action was brought against *Mrs. Bandow* and her husband to enforce a mechanic's lien for the price of labor performed and materials furnished by the plaintiffs in the erection of a dwelling-house on a certain lot belonging to the wife. A trial of the action resulted in a personal judgment against the defendant husband for a certain sum, and the same was adjudged a lien upon the dwelling-house and lot of the wife. *Mrs. Bandow* appealed from the portion of the judgment affecting her property, and this court reversed the portion appealed from, on the ground that it was unsupported by the complaint. 43 Wis., 556. No appeal was taken from the per-

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sonal judgment against the defendant husband. After the cause was remitted to the circuit court, the plaintiffs moved, on affidavits, for leave to amend their complaint so as to allege the personal liability of *Mrs. Bandow* for the debt set forth in the complaint, and for a new trial. The court granted the motion, and *Mrs. Bandow* appealed from the order.

The cause was submitted for the appellant on the brief of *Jones & Sanborn*.

H. W. Lee, for the respondents.

LYON, J. The order from which this appeal was taken does not purport to set aside the personal judgment against the defendant Frederick A. Bandow. That judgment remains in full force, and the action as to him is finally determined. The order under consideration opens the case as to the appellant, *Mrs. Bandow*, and allows the plaintiffs to prosecute their original claim against her alone. It seems to us that there is an insuperable obstacle to such a proceeding. The affidavits upon which the order was made, show at most that *Mrs. Bandow* was jointly indebted with her husband to the plaintiffs for the labor and materials mentioned in the complaint. It is perfectly well settled, that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and, being indivisible, it cannot be merged or cancelled as to one, and existing and operative as to another joint debtor. *Bowen v. Hastings*, 47 Wis., 232, and cases cited.

This rule is applicable to the present case; for, manifestly, *Mrs. Bandow* is in the same position she would have occupied had the plaintiffs brought suit against her husband alone, and prosecuted it to judgment, and then brought their action

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against her to charge her with the alleged joint liability. Although in form she was sued jointly with her husband, the original complaint failed to state a cause of action against her, and this proceeding is, in substance and effect, the commencement of a new action against her. But whether it be a new action or a continuation of the original suit, in either case the joint debt is merged in the judgment against the husband, and there is no cause of action remaining against *Mrs. Bandow*.

We perceive no escape from the conclusion that the order was improperly granted.

By the Court. — Order reversed.

THE NATIONAL BANK OF NEENAH VS. KETCHUM, imp.

February 24 — March 9, 1880.

Opening judgment for new trial.

After a note running to plaintiff and indorsed by K. was past due, K. indorsed a second note, executed to plaintiff by the same makers, to take up the former; and this second note was delivered to plaintiff without requiring a surrender of the first. In an action on the second note, K. having made default, and judgment having gone against him as well as the makers, he afterwards, upon affidavits to excuse his default, moved to vacate the judgment against him and for leave to answer, on the ground that the second note was not to take effect except upon surrender of the first, and that plaintiff still held the first, and had refused to surrender it on demand. Plaintiff's counter affidavits tended to show that the first note had never been demanded, and that plaintiff had always been ready to surrender it; and it was in fact surrendered to one of the makers before the motion was heard. *Held*, that it does not appear that K. could have been injured by plaintiff's retention of the first note, or is injured by the judgment; and his motion was properly denied.

APPEAL from the Circuit Court for *Waupaca* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought September 28, 1878, against *Ketchum* as indorser, and Isaac Brown, A. J. Fulton and

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John W. Bishop, composing the firm of Brown, Fulton & Bishop, as makers, of a promissory note for \$1,000, bearing date June 25, 1877, payable 90 days after date to said *Ketchum* or his order, and duly indorsed by *Ketchum* and delivered to the plaintiff. The summons was, on said 28th day of September, personally served upon all the defendants except Fulton, and was personally served on him on the 31st day of October, 1878. *Ketchum* did not answer the complaint within the time required by law. Brown answered, and admitted the making and delivering of the note, denied indebtedness to the amount claimed by the plaintiff, and set up a counterclaim for \$25, which was admitted by the plaintiff. At the January term, 1879, judgment was entered against all the defendants for the amount due on the note, less \$25. After the entry of such judgment, *Ketchum* made a motion to set aside his default and the judgment, and asked leave to file an answer; such motion being based upon the affidavits of himself, Brown and his attorneys, and his proposed answer. The motion was heard and denied on the 10th of April, 1879; and *Ketchum* appealed from the order."

The cause was submitted on the brief of *G. W. Cate*, of counsel, for the appellant, and that of *Webb & Cochran* for the respondent.

TAYLOR, J. We think the court was clearly right in refusing to set aside the judgment. The affidavit upon which the appellant founded his motion to set aside the default, does not show that he has any defense to the action. He states that the note sued upon was made, executed and delivered to the respondent for the sole purpose of paying and taking up a note then held by the respondent against Brown, Fulton & Bishop, which had been indorsed by him, and which was long since past due, and that the respondent had refused upon demand to give up or surrender such former note; that he supposed the note so indorsed by him had been given up, and did

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not learn the contrary until the fourteenth day of January, 1879. Brown, in his affidavit, also swears that the note sued on was delivered to the plaintiff in payment of and to take up such first note, and that he demanded such first note of the plaintiff, and its surrender was refused; but he states no time when such demand was made, nor that he ever demanded a surrender of the note upon which this action is brought, on account of a refusal to deliver the other note. The affidavits read in opposition admit that the note sued on was given in payment of a former note held by the appellant against the same defendants, and which was then long past due and unpaid; deny that any demand was ever made of such former note; allege that they have always been ready and willing to deliver up the same when called for, and offer to deliver the same, and that afterwards and before this motion was heard, the same was delivered to and received by the defendant Brown.

Independent of the facts shown by the respondents on the hearing of the motion, there was no reason for setting aside the default. The appellant's proofs show that the note in payment of which the note sued upon was delivered to the respondent, was in the hands of the respondent at the time of the delivery of the second note, and was long past due. That note, therefore, was paid and fully satisfied by the delivery to and acceptance of the note in question, in this suit, by the respondent. The refusal to surrender it, if there had been such refusal, could not, therefore, work any damage to the appellant. Had he been sued upon his indorsement upon the first note, the facts which he states in his affidavit, if proved, would have been a perfect defense to such action. The note sued upon was given upon a sufficient consideration, to wit, the payment of the former note, and that consideration has not failed. The facts alleged in the affidavits upon which the motion was founded, do not show that the appellant has been injured by the retention of the former note by the respondent. The facts stated do not show that it was agreed between the parties that

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the surrender of the former note should be a condition precedent to the taking effect of the note upon which this action is brought; and the fact that the same was delivered to the respondent before such other note was surrendered has a strong tendency to disprove the fact of any such condition precedent, or to prove that, if there was one, it was waived by the delivery of this note without requiring its surrender at the time.

The appellant's case, as made by his affidavits, admits that he is indebted to the respondent either upon the note sued upon or upon the former note, to the amount of the judgment against him; and his attempt to avoid the judgment, upon the grounds stated, fails to convince us that he has any defense upon the merits to the action. The judgment ought, therefore, to stand.

By the Court.—The order of the circuit court is affirmed.

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February 24—March 9, 1880.

PRACTICE: TRIAL: APPEAL: CHARGE. (1) *Waiver of objection to jury trial.* (2) *Presumption in favor of judgment.* (3) *What constitutes the charge to the jury.*

RIGHT OF RECOVERY: EVIDENCE. (4, 5) *What facts will not defeat a recovery for services.* (6) *Rebutting evidence.*

1. Where the cause was submitted to a jury, and all the issues determined by it, without objection, it is too late to object, upon appeal, that upon the case made by the pleadings the court should have adjudged an *accounting*.
2. Where the bill of exceptions is not stated therein to contain all the evidence, this court must presume that every fact necessary to support the verdict and judgment was duly proven.
3. A casual remark made by the judge in ruling upon the admissibility of evidence, and not objected to at the time, cannot be reviewed as a part of the charge to the jury.

48	645
78	607
48	643
107	161

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4. A person employed to keep the account books of another may recover the balance due for his services upon other proof thereof, although the books were so negligently and unskillfully kept as not to show the state of the accounts between the parties.
5. The fact that plaintiff was negligent and unskillful in his employment will not prevent his recovering what his services were really worth.
6. After evidence introduced by defendant to show plaintiff's negligence and want of skill in his employment, it was competent for plaintiff, in rebuttal, to introduce testimony that he was competent or qualified for the employment, or that he was skillful, faithful and serviceable therein.

APPEAL from the Circuit Court for *Waupaca* County.

Defendant appealed from a judgment in favor of the plaintiff.

The appeal was submitted on the brief of *G. W. Cate*, of counsel, for the appellant, and that of *Webb & Cochran* for the respondent.

ORTON, J. The complaint is for work and labor, and for money paid and expended. The answer sets up that the plaintiff was unskillful, and that his services were valueless; that he had received certain payments; and that his conduct in the business of his employment was such that the defendant suffered damage, which, by an amendment of the answer, is alleged to be the sum of \$3,500, and is stated as a counterclaim; and the answer prays for an accounting by the plaintiff.

The appellant claims here that the circuit court erred in not adjudging such an accounting. Whether this is a proper case for an accounting by either party, we do not decide. The cause having been submitted to and tried by a jury, and all of the matters in controversy by the pleadings having been fully considered and passed upon by the jury, without any objection on the part of the appellant, this objection to the verdict and judgment must be deemed to have been waived. *Leonard v. Rogan et al.*, 20 Wis., 540.

All questions raised as to the effect of the evidence, as supporting the verdict or otherwise, and so fully and ably discussed by the learned counsel on both sides, cannot be con-

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sidered, because "the bill of exceptions does not purport to contain all of the testimony; and, in the absence of a statement therein to that effect, we must presume, in support of the verdict and judgment, that every fact which was essential to a recovery by the plaintiff, was duly proved on the trial. This rule is too well settled to require the citation of authorities to sustain it." This extract is taken from the opinion of Mr. Justice LYON, in the case of *Conklin v. Hawthorn et al.*, 29 Wis., 476, and renders another or new decision of the question unnecessary.

The casual remark of the learned judge, on the trial, in ruling upon the admissibility in evidence of the Arcadia yard books kept by one Hollenbeck, and the Whitehall books kept by one Earl, is excepted to, as a part of the charge of the court to the jury, and was not objected to at the time, so far as the printed case shows. This practice cannot be sanctioned; but it is sufficient to say that the remark of the judge in respect to these books, that "they don't affect the plaintiff one whit," appears to have been strictly correct; for the books, as such, had not been verified by those who kept them.

The instruction asked by the learned counsel of the appellant, the refusal of which is assigned as error, was as follows: "If the jury find from the evidence that the services of the plaintiff in keeping the books of the defendant were negligently and unskillfully performed, by failing to keep the same in such a manner as to show the true state of accounts therein pretended to be kept, and entered therein, in such case he is not entitled to recover at all." This instruction is somewhat obscure; but the court seemed to understand it to mean, and we think correctly, that if the plaintiff, in keeping the books, was so negligent and unskillful that the state of the accounts between the parties could not be ascertained from the books, then the plaintiff could recover nothing for his services. In this view the instruction was clearly incorrect, for it ignored all other evidence of the plaintiff's services and their value.

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But if the meaning of the instruction was, that if the plaintiff was negligent and unskillful in his employment he could recover nothing for his services, because he had not fully performed his contract of employment, it was equally erroneous. In such a case the plaintiff would be entitled to recover what his services were reasonably worth, so long as the appellant allowed him to continue in his employment. This action is brought in the *quantum meruit*, and the court in the general charge stated the true equitable rule in such a case: "If the plaintiff's services were worthless, or of no value, he is not entitled to recover anything, but if they are of value, he is entitled to recover that value." *Cole et al. v. Clarke*, 3 Wis., 323; *Taylor v. Williams*, 6 Wis., 363; *Jackson et al. v. Cleveland*, 15 Wis., 108.

Exception was taken to the question, "State whether the plaintiff was a valuable man to the defendant for the employment in which he was engaged." The question was clearly proper, as understood and explained by the court, as meaning whether the plaintiff was *competent* or *qualified* for the business in which he was engaged. Or, if understood as meaning whether the plaintiff was skillful, faithful or serviceable in such employment, it is not perceived why the question was not a proper one to rebut the attempted proof of the plaintiff's negligence and want of skill in his employment.

This cause, both in the pleadings and proofs, was difficult and complicated in the extreme, and not easily or very satisfactorily tried with a jury; and we think the circuit court was remarkably judicious in its conduct and rulings.

By the Court.—The judgment of the circuit court is affirmed, with costs.

Ingalls vs. The State.

INGALLS VS. THE STATE.

February 24— March 9, 1880.

CRIMINAL LAW AND PRACTICE. (1) *For what purpose intoxication of the accused may be shown.* (2) *Instructions as to testimony of accomplice.* (3) *Instruction as to falsus in uno, etc.* (4) *Whether defendant can be required to testify to a former conviction.* (5) *Possession of stolen goods; its effect as evidence.* (6) *Increased penalty for second offense valid.*

1. In a criminal action, it is competent for the accused to show that at or about the time when the crime was committed, he was in such a physical condition as to render it improbable that he committed it; and the fact that such condition was caused by intoxication makes no difference in the rule, the intoxication not being set up as a defense.
2. In a criminal action, it is in general within the discretion of the court below whether to instruct the jury not to find defendant guilty upon the unsupported testimony of an accomplice; and where that court refuses a new trial after a verdict founded upon such testimony alone, this court will not reverse the judgment upon that ground.
3. A refusal to instruct the jury, in a criminal action, that "if a witness knowingly and deliberately swear falsely in regard to one material fact, the jury are not bound to believe any of his statements unless corroborated by other proof," is *held* no error, where there was no evidence showing that any witness in the case had thus sworn.
4. *It seems* that, independently of sec. 4073, R. S., the defendant in a criminal action could not be *required*, as a witness, to testify whether he had ever been convicted of an infamous crime not charged in the information for the purpose of subjecting him to punishment as for a second offense; that the right of the witness in any case to decline answering such a question on the ground that the answer would tend to degrade him, was personal to such witness, and could not be taken by the party calling him; but that the objection that such testimony is not the best evidence of the fact might be taken, specifically, by such party. No opinion is here expressed as to the construction of said sec. 4073.
5. Mere possession of stolen goods, by the accused, shortly after the larceny, does not raise any legal presumption of his guilt, but is merely a circumstance to be considered by the jury in connection with the other facts in the case.
6. Statutes imposing a greater penalty for a second or third offense of the same character than that imposed for the first offense, do not violate the constitutional provision which forbids putting one twice in jeopardy for the same offense.

48	647
88	494
48	647
88	183

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ERROR to the Circuit Court for *Polk* County.

The case is thus stated by Mr. Justice TAYLOR:

"The plaintiff in error was tried in the circuit court of Rock county upon an information charging him with the larceny of goods from a shop, of the value of more than \$100. The information also charged the larceny as a second offense, alleging the fact that he had been theretofore duly convicted and punished for a previous larceny committed by him. The plaintiff in error was convicted of the larceny charged in the information. The evidence showed, and the jury found, that he had been convicted of the former larceny charged in the information, and he was sentenced to the state prison for the term of five years. Exceptions were taken by the defendant on the trial to the rulings of the court in excluding evidence offered on his part; to parts of the instructions given by the learned circuit judge to the jury; and to his refusal to give several instructions requested by the defendant. After judgment, a bill of exceptions was duly settled and signed, and the record is brought to this court by a writ of error.

"The first error assigned by the learned counsel for the plaintiff in error in this court is, that the circuit judge improperly excluded evidence offered on his part tending to show that, at the time the alleged larceny was committed, he was so much intoxicated that it was improbable, if not impossible, that he could have committed the larceny charged.

"The evidence on the part of the state showed that a hole had been cut in the upper part of the pane of glass in the lower sash, large enough to permit the insertion of a man's hand and arm; and that a nail which fastened the lower sash had been removed, the window then opened and the goods removed, without any disturbance or confusion of the goods in the shop which were not taken. The plaintiff in error had sworn that he had been drinking very often, on the night the larceny was committed, of both whisky and beer; and that he had left Janesville before the larceny was committed, and knew

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nothing about it. He then called as a witness one Albert Jones, who had seen the plaintiff in error in the evening before the larceny had been committed. The witness was asked the following question: 'Where and in what condition was he?' The question was objected to by the district attorney as incompetent, and thereupon the following colloquy took place between the learned circuit judge and the counsel for the defendant:

Judge. 'The testimony of the defendant here indicates not only the possession of his faculties, but a distinct remembrance of what took place at the time; and I don't see the propriety of taking up the time to show his condition. The only question is, whether he was so under the influence of liquor that he did not know what he was doing. He has stated himself that he was at various places, and what he was doing.' *Counsel.* 'We desire to show that he was in such a condition that he could not have done this job as neatly as it was done.' *Judge.* 'I don't understand you are entitled to show that. The evidence is only admissible for the purpose of showing that the person was so under the influence of liquor that he did not comprehend what he was doing.' *Counsel.* 'We offer the evidence for the purpose of showing that the defendant was physically and mentally incapable of committing the burglary as it is shown to have been done.' *Court.* 'If that is the purpose, I will exclude it. It is only admissible for the purpose I have indicated, and not for any other.'

"The defendant duly excepted to the ruling of the judge excluding the evidence. Afterwards, in his instructions to the jury, the learned circuit judge reiterated the same idea as to the purposes for which the intoxication of the accused could be considered by the jury, and said: 'One cannot shield himself under the plea of intoxication to justify the commission of any act; and the only way that intoxication becomes admissible in evidence at all, is to show that, when the act

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complained of was committed, the party was so intoxicated as to be beside himself, was not in his right mind; and if that mental condition was produced by temporary intoxication, why intoxication may be shown. But when the testimony shows that the person was not so far gone, his mental faculties were not so impaired by intoxication as to deprive him of reason and put him in a condition where he didn't know what he was doing, it don't go as a defense at all. It is only when it tends to show that the person, who committed the act by reason of intoxication was not in his right mind, that it is a defense.' This instruction was also excepted to by the defendant."

The cause was submitted on the brief of *Lavinia Goodell* for the plaintiff in error, and that of the *Attorney General* for the defendant in error.

TAYLOR, J. We are strongly impressed with the idea that the learned judge did not fully understand the object of the offer to show the condition of the defendant as to drunkenness, at or about the time the larceny was committed. As we understand the offer, it was not to show that the accused was in such a mental condition as would excuse the commission of an act which would constitute the crime of larceny if committed by a sober man. It was not offered as an excuse or defense for a larceny committed, but for the purpose of showing that it was highly improbable that the accused did in fact commit the acts complained of, viz., the entering of the shop, and removing the goods therefrom; not as a defense for want of mental capacity, but as evidence tending to show that the acts which constituted the offense were not done by the accused. This object of the evidence seems to us to have been sufficiently indicated by the learned counsel for the defendant; and for the purpose so indicated we are of the opinion the evidence was clearly competent.

The authorities cited in the brief of the learned counsel for

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the plaintiff in error indicate in what cases it is competent to show the intoxication of the accused upon the question of the particular intent with which an unlawful or wrongful act was done, when such intent is necessary to constitute the offense charged. None of the cases cited, however, have a direct bearing upon the point made in this case. It would seem, however, that there can be no doubt as to the right of a person accused of crime to show that at the time of its commission he was physically incapable of committing it. There can be no doubt of the right of the accused to show that he was at the time prostrated by a disease which rendered it highly improbable that he could have endured the exertion and labor necessary to commit the crime. And so we think if, in this case, the evidence had shown that, within a few hours of the time this larceny must have been committed, the accused had been temporarily prostrated by drunkenness, so as to render it highly improbable that he could have been present at the place where the crime was committed, or, if able to be present, that he could have done what the evidence shows was done by those who committed the larceny, he is equally entitled to show that fact. In such case the intoxication is not shown for the purpose of excuse or mitigation of the offense charged, but as evidence tending to show that he was not present and did not commit the acts constituting the offense. Evidence of this kind would have but little weight against direct evidence showing the actual presence of the accused at the time and place when and where the crime was committed; but, certainly, in the absence of any such direct evidence, the accused may give in evidence any fact which would have a natural tendency to render it improbable that he was there and did the acts complained of; and the fact that drunkenness was the thing which tended to prove such improbability, can make no difference. If a man by voluntary drunkenness renders himself incapable of walking for a limited time, it is just as competent evidence tending to show that

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he did not walk during the time he was so incapable, as though he had been so rendered incapable by paralysis of his limbs from some cause over which he had no control. The cause of the incapacity in such case is immaterial; the material question is, Was he in fact incapable of doing the acts charged? We cannot speculate upon the effect which the evidence, if admitted, would have had upon the verdict of the jury in this case. It was offered, apparently in good faith, as evidence tending to show that the accused could not have committed the offense. Had the drunkenness been proved so complete as to have destroyed his powers of locomotion, or so as to have destroyed the steady use of his limbs, it would have had a tendency to disprove the charge made against him. The evidence being material, it should have been admitted, and its rejection was an error for which this court is compelled to reverse the judgment.

The learned counsel for the plaintiff in error insist that the court erred in refusing to charge the jury, as requested, as to the effect which should be given to the evidence of an accomplice. The substance of the requests asked was, that the circuit judge should instruct the jury not to convict the accused upon the evidence of an accomplice, unsupported by any other evidence in the case. In regard to this point we think the evidence in the first place does not conclusively show that the witness Bender, who is the supposed accomplice, was such; and if it does show him to be such, then his evidence is, in fact, supported and corroborated by other evidence in the case. But we are of the opinion that there is no rule of law which requires the trial judge to instruct the jury to acquit the prisoner, in case his guilt is established only by the unsupported testimony of an accomplice. In England it is stated that, as a rule of practice, the trial judges do usually so charge the jury, but that on refusal to so charge, followed by a conviction and judgment, the judgment will not be reversed for that cause, on appeal. *Regina v. Stubbs*, 33 Eng.

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Law and Eq., 552. If the jury convict upon the testimony of an accomplice alone, and the trial judge is satisfied with the verdict and refuses a new trial, the appellate court will not, as a general rule, reverse for that cause. *Brown v. Commonwealth*, 11 Leigh, 711; 1 Whart. Crim. Law, § 785, and cases cited; 1 Bishop's Crim. Proced., § 1081.

We think the general rule, as established in this country and in England, is that it is a matter to a great extent in the discretion of the trial judge whether or not he will instruct the jury to acquit the prisoner when there is no evidence of his guilt except the testimony of an accomplice, uncorroborated as to any material fact; and that it is not error for the trial judge to refuse so to instruct. See cases above cited.

The learned counsel for the plaintiff in error alleges that the court erred in refusing to give the following charge to the jury, as requested: "That if a witness knowingly and deliberately swear falsely in regard to one material fact, the jury are not bound to believe any of his statements unless corroborated by other proof." This instruction may be good as an abstract question of law; but we do not find from the record that it has any application to the testimony of any of the witnesses sworn on the trial of this case. It is said in the argument that the witness Kinney clearly testified falsely as to what he told the witness Miss King; but upon examination of the testimony of these witnesses it is apparent that the witness Kinney did not admit that he told Miss King what she swears he did. The question asked Kinney on his cross examination was: "Didn't you state to Miss Angie King, in this city, on the afternoon of the 30th of April last, that you did not *notice anything* about what kind of clothes *Ingalls* had on at Turner Junction?" To this question the witness answered that he did not. When Miss King was called as a witness, she answered to the direct question: "Did he say to you, on the 30th day of April last, that he saw *Thomas Ingalls* at Turner Junction, but that he didn't *notice anything*

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about what kind of clothes he had on?" "He did." But, from her cross examination, it is quite evident that she was not an over-exact witness, and that what she remembered of her conversation with him was more of a general nature than of the exact words he used. Kinney himself, when recalled, does not admit that he made the statement sworn to by Miss King, but says: "She first asked me whether I was going to appear against *Ingalls*, and asked whether I took *any particular notice* of his clothes. I said I did not take *particular notice* of them, and passed on."

The witness swore, on his direct examination, that he did not tell Miss King he did not notice anything about what kind of clothes *Ingalls* had on. She says to the direct question he did; and he admits on his reëxamination, that he stated to her, in reply to her question whether he took any *particular notice of his clothes*, that he "did not take *particular notice of them*, and passed on." There is no admission on his part that he swore falsely on his first examination. He was asked a particular question, and he denies that he made the statement in the exact form of the question, and afterwards admits that he made a statement to Miss King different in both form and substance. We do not think there was any evidence showing that the witness Kinney had sworn willfully false in any part of his testimony; and there was, therefore, no occasion for giving the instruction asked.

It is also charged that the circuit judge erred in requiring the defendant, when upon the stand as a witness, to testify that he had been convicted of a larceny not charged in the information. A question similar to this came before this court in the case of *Kirschner v. The State*, 9 Wis., 140. In that case the following question was asked the witness: "Have you not been convicted of larceny and sentenced to the penitentiary in Illinois?" And the court instructed the witness that he need not answer the same. Chief Justice Dixon, in delivering the opinion in that case, says, in regard to this

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question, "that it was properly overruled for two reasons: *first*, because the answer tended to degrade the witness by showing that he had been guilty of an infamous crime; and *second*, for the reason that the best evidence of his conviction was the record of his trial and conviction." According to the rule of that case, it would seem that the evidence that the defendant had been theretofore convicted of an infamous crime ought not to have been received, unless such conviction was charged in the information for the purpose of convicting and punishing the accused for a second offense. The conviction as to which the defendant was required to answer was not the one charged in the information, and should not have been received in evidence against the objection of the defendant. The witness may undoubtedly waive his privilege and answer if he sees fit, but ought not to be compelled to do so against his objection. The objection to the introduction of testimony charging the witness with an infamous crime is one which must be taken by the witness himself, and not by the party for whom he is called. It is a personal privilege, and not a right of the party calling him. It is probable that the objection to the evidence in the case of the witness Snell, who was interrogated as to his conviction of an infamous crime, was overruled by the learned circuit judge on the ground that the objection was not made by the witness but by the party calling him. But, in the case of the witness Snell, if the party calling him had objected to the evidence on the ground that the record was the best evidence of his conviction, the objection should have been sustained, under the decision in *Kirschner v. The State*, *supra*.

It is also urged by the learned counsel for the plaintiff in error, that the circuit judge, in his instructions to the jury, gave too much importance to the evidence of the possession of stolen goods, or some part of them, by the accused shortly after the larceny. The effect of such evidence was very ably discussed by the late Chief Justice Dixon, in the case of

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Graves v. The State, 12 Wis., 591, and more recently by Justice ORTON, in the case of *The State v. Snell*, 46 Wis., 524. The rule to be derived from these cases, and which is sustained by the later elementary writers upon evidence in criminal cases, is, that the possession of the stolen goods by the accused recently after the larceny does not raise any legal presumption of the guilt of the party so found in possession. The fact of the possession of the stolen property by the accused is evidence tending to prove his guilt, but is in no sense conclusive as to his guilt; nor does his guilt follow as a presumption of law unless such possession be explained by the accused.

The courts of California have held that it was error to charge the jury that they should convict the accused upon the mere proof of the possession of the stolen property recently after the larceny. See *People v. Ah Ki*, 20 Cal., 177; *People v. Chambers*, 18 Cal., 382; *People v. Levison*, 16 Cal., 98. And these decisions seem to be supported by both Wharton and Greenleaf. See 2 Wharton on Criminal Law, § 728, and 3 Greenleaf's Evidence, § 31. The true rule, we think, is well stated by Greenleaf in the section above cited. Speaking of the presumption arising from the possession of the stolen goods, he says: "The presumption being not conclusive but disputable, and therefore to be dealt with by the jury alone, as a mere inference of fact, its force and value will depend on several considerations. In the first place, if the fact of possession stands alone, wholly unconnected with any other circumstances, its value or persuasive power is very slight; for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt, whether it be the instrument of homicide, burglary or other crime, or the fruits of robbery or larceny; or it may have been thrown away by the felon in his flight and found by the possessor, or have been taken away from him in order to restore it to the true owner, or otherwise have come lawfully into his possession. It will be necessary, therefore,

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for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction." The learned writer then goes on to indicate what circumstances should be proved, to make the possession available to produce a conviction.

It is evident that mere possession of stolen goods by a party accused ought not to be in every case, if in any, sufficient evidence to justify a conviction. Take the case of a reputable citizen, whose character is such that no suspicion of crime has attached to him, charged with stealing a horse, and the only proof is that the horse was found, the next morning after he was stolen, in his stable, the stable being one which could be entered without the aid of the accused. Clearly in such a case the presumption of innocence would outweigh the inference of guilt arising out of the fact of possession. So, if a purse of money had been stolen in a crowd, and soon after the theft the same had been found in the pocket of a man of known reputable character, the pocket being such that the purse could have been put there without his knowledge, the circumstance would hardly raise a suspicion sufficient to lean a charge of theft upon. It is not so much the mere possession of the stolen goods, as it is the nature of the possession; whether it is an open and unconcealed one, or whether the goods are such as the person found in possession thereof would probably be possessed of in a lawful way. If property of great value should be found in the possession of one known to be poor, so as to render it highly improbable that he had purchased it, an inference of guilt would arise much stronger than if such property were found in the possession of a man of wealth, who would probably purchase goods of such value. It would be impossible to enumerate the variety of circumstances attending the mere possession of stolen goods, which would lessen or increase the inference of guilty possession. In directing a jury, therefore, as to the weight they should give to the possession of stolen goods or

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the instruments of crime as evidence of guilt, care should be taken not to place too much importance upon the mere possession, but their attention should be called to the character of the possession and the circumstances attending it. Without holding that the learned circuit judge erred in his instructions to the jury upon this point, under the whole evidence in the case, we are inclined to think too much stress was laid upon the fact of the possession, and perhaps not enough upon the circumstances under which the accused was found in the possession.

We are unable to see how the statute which imposes a greater punishment upon a person who commits a second or third offense of the same character than it imposes upon the person who is convicted of a first offense, violates the provision of our constitution which prohibits putting a person twice in jeopardy for the same offense. The increased severity of the punishment for the subsequent offense is not a punishment of the person for the first offense a second time, but a severer punishment for the second offense, because the commission of the second offense is evidence of the incorrigible and dangerous character of the accused, which calls for and demands a severer punishment than should be inflicted upon the person guilty of a first crime.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison will surrender the plaintiff in error to the sheriff of Rock county, who will hold him in custody until he shall be discharged, or his custody changed by due course of law.

On the 20th of April, 1880, the following additional opinion was filed:

TAYLOR, J. When this case was argued, the attention of this court was not called to the provisions of sec. 4073, R. S. 1878, and that section was entirely overlooked in the consider-

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ation of the case. What was said, therefore, in the opinion as to the propriety of compelling the accused, when testifying as a witness in his own behalf, to answer upon his cross examination questions in regard to his having been previously convicted of an infamous crime, was not intended as expressing any opinion upon the construction of that section.

CASES DETERMINED

AT THE

January Term, 1880.

GRAFTON VS. CARMICHAEL.

March 9 — March 30, 1880.

TRESPASS in taking goods: When one becomes a trespasser *ab initio*.
(1) *Complaint construed: nature of action.* (2) *General doctrine as to trespass ab initio.* (3) *Case stated: Attachment suit.*

1. The complaint alleges that, on etc., defendant broke and entered upon plaintiff's farm, and took from his possession certain personal property of the plaintiff, carried it away and converted it to his own use. *Held*, an action *de bonis asportatis*, and not of trover.
2. According to the general tendency of modern decisions, one who does an act under a lawful authority will not be rendered a trespasser *ab initio* by subsequent irregularities, except where he does or consents to some positive act which goes to show that the original lawful act was done with an unlawful purpose.
3. Accordingly, the plaintiff, in an attachment suit in justice's court, may justify a taking of defendant's goods under a valid attachment, although the subsequent judgment against the attachment defendant, and sale of the goods on execution, are invalid by reason of a subsequent failure of the justice to cause notice to such defendant to be posted, etc., as required by law where personal service of the writ is not made; and this though such attachment plaintiff received a portion of the money made on the execution.

APPEAL from the Circuit Court for *Dane County*.

Plaintiff appealed from a judgment in defendant's favor.
The case is stated in the opinion.

For the appellant, there was a brief by *Welch & Botkin*,

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his attorneys, and *F. J. Lamb*, of counsel, and oral argument by *Mr. Lamb*. They contended, among other things, 1. That the writ of attachment was no protection to either the officer or the attachment plaintiff, where there was a failure to obtain jurisdiction of the attachment defendant. *Hale v. Cummings*, 3 Ala., 398; *Lamb v. Belden*, 16 Ark., 541; *Watts v. Willett*, 2 Hilt., 212; *Johnson v. Edson*, 2 Aik. (Vt.), 299; *Clap v. Bell*, 4 Mass., 99; *Suydam v. Huggeford*, 23 Pick., 465; *Harrow v. Lyon*, 3 G. Greene, 157; *O'Connor v. Blake*, 29 Cal., 312. 2. That if one enters the possession of another by direct license of the possessor, nothing he may do afterwards will make him a trespasser from the beginning; but if he first invades the possession by virtue of a license *given by law* (as an officer with a writ, a guest at an inn, etc.), and afterwards, in carrying out the purpose for which the entry was made, exceeds the powers given him by law in the matter, he becomes a trespasser from the beginning. *Sackrider v. M'Donald*, 10 Johns., 253, per KENT, C. J. 3. That the court erred in holding the complaint to be merely for trespass. The pleading was not confined to the trespass, but set forth plaintiff's whole case, and alleged the conversion of the horse by defendant as the principal ground of damage. And the pleading ought to be liberally construed with a view to substantial justice, irrespective of ancient forms of action.

For the respondent, there was a brief by *Vilas & Bryant*, and oral argument by *Wm. F. Vilas*:

The fact that defendant sued out the warrant of attachment and put it into the officer's hands, would not make him liable for taking the property of this plaintiff; because the warrant directed only the taking of Nelson Grafton's property, and the taking of any other under it would be the officer's independent, personal act. The only ground on which this action can be based against this defendant is, that he directed and aided the officer in taking the property levied upon. And so the complaint charges distinctly that, and nothing more; and

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plaintiff's evidence against defendant was confined to that charge. But that act was completely justified by producing the officer's warrants of attachment, with proof that the attachment plaintiffs were creditors of Nelson Grafton, and that the alleged sale to this plaintiff was either a false pretense or fraudulent as to creditors. If the officer or the justice subsequently failed to take such further steps as would render the subsequent sale on execution valid as against Nelson Grafton, that did not render this defendant liable, he not having participated in that act. Even the officer, it is suggested, would not be liable in that case, at least until after a demand and refusal (which were not shown), the original taking having been lawful. See *Clap v. Bell* and *Suydam v. Huggefords*, cited for the appellant. The rule in regard to trespasses *ab initio* seems to have nothing to do with the question, as there is no proof of any subsequent abuse of authority by defendant to characterize his previous lawful act as done with an unlawful motive.

COLE, J. It is essential to determine at the outset the nature of this action, because upon that question rests entirely the sufficiency of the defense. The counsel for the defendant insists that it is purely an action of trespass *de bonis asportatis*, while the counsel for the plaintiff claims that it should be treated as an action of trover for a conversion. The point is technical, yet it seems to be a vital one in view of the justification set up in the answer and established upon the trial. Upon looking at the complaint, we have no doubt that it is simply an action for a tortious taking and carrying away of personal property from the possession of the plaintiff.

The complaint charges and alleges, in substance, that on the 26th day of September, 1876, the defendant wrongfully broke and entered upon the farm of the plaintiff, and took from his possession the personal property described, being the property of the plaintiff, and then and there carried the same

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away, and converted it to his own use. Thus it will be seen that the gravamen of the charge is a wrongful and unlawful taking of personal property from the possession of the plaintiff; and this act, of course, was the matter which the defendant was called upon to justify. He did attempt to justify the taking, by alleging in his answer that the property in question was seized by the sheriff by virtue of certain warrants of attachment which were sued out by him and other parties, all creditors of one Nelson Grafton, who, it was alleged, was either the owner of the same, or had fraudulently disposed of the property to the plaintiff for the purpose of defrauding his creditors.

On the trial, the defendant was permitted to give testimony, against the plaintiff's objection, in support of these averments of the answer, showing that all the plaintiffs in the attachment suit named were creditors of Nelson Grafton, and that the property was seized upon writs of attachment sued out by them; and also introduced proof which tended very strongly to impeach the validity of the sale made by Nelson Grafton to the plaintiff, as against the former's creditors. The warrants of attachment were offered in evidence by the plaintiff, and were valid and regular in form. The plaintiff also introduced papers and transcripts of the justice's docket of proceedings in the attachment suits, which showed that the sheriff seized the property on the warrants of attachment, and subsequently sold it under executions issued on judgments rendered therein. But it appeared that these judgments were invalid, by reason of the failure of the justice to cause notice to the attachment defendant to be posted or published as required by law, where personal service of the writs was not made. *Champion v. Argall*, 25 Wis., 521. It appeared that the defendant was present, aiding and directing the officer when he seized the property upon the attachments, but did not in any other way participate in its taking or possession.

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Now the question, arising in various ways upon the record, is, whether the defendant could justify the original taking under the writs of attachment without showing regular subsequent proceedings in the attachment suits. He was allowed to prove, as we think, properly, that the plaintiffs in those suits were creditors of Nelson Grafton (*Bean v. Loftus, ante*, p. 371), the seizure on the attachments against plaintiff's vendor, and that there were reasonable grounds for questioning the *bona fides* of the sale made to him. But the counsel for the plaintiff insists that though the property was seized in the first instance upon valid attachments, still this fact affords no legal excuse or justification for the taking, because, as the writs were not properly served on the attachment defendant, the proceedings did not and could not terminate in valid judgments. He says the subsequent unlawful disposal of the property, under executions issued on void judgments, had the effect to deprive both the officer and defendant of the right to justify the original taking under valid process, and rendered them liable as trespassers *ab initio*.

We do not concur in this view of the law. In the present case we have only to do with the sufficiency of the justification of the defendant, who had no other participation in the taking than by aiding the officer to make the levy on that occasion. He has not been guilty of abuse of authority, or of any wrongful act, which would render him liable as a trespasser. The failure of jurisdiction in the attachment suits is not attributable to any act of omission or commission on his part. It was the fault alone of the justice, who failed to have the proper notice published. It is true, it appears that the defendant received a portion of the money realized on the sale of the property under the executions, and possibly rendered himself liable therefor in some other form of action. That is a point, however, we need not now consider. But the question here is, whether this action of trespass can be maintained against the defendant under the facts and circumstances clearly

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established. It will be borne in mind that the original taking was under lawful writs; and with this taking the agency of the defendant in the matter ends, unless, on account of the defect in the subsequent proceedings, which was not owing to his fault, he is liable to be treated as a trespasser *ab initio*; and we do not think he can be held liable on that ground, there being no proof of any positive wrong on his part, which would tend to show that the original taking, though lawful, was for some other indirect or unjustifiable purpose. Nothing of the kind can be claimed here.

Of course, the rule is well settled that one who at first acts with propriety under an authority or license given by law, and afterwards abuses it, may be treated as a trespasser from the beginning. The reason of the rule, as stated by an elementary writer, is, "that it would be contrary to sound public policy to permit a man to justify himself under a license or authority allowed him by law, after he had abused the license or authority thus allowed him, and used it for improper purposes. The presumption of law is, that he who thus abuses authority assumed the exercise of it in the first place for the purpose of abusing it. The abuse is, therefore, very justly held to be a forfeiture of all protection which the law would otherwise give." Waterman on Trespass, § 493. Also, *Ross v. Philbrick*, 39 Maine, 29; *Everett v. Herrin*, 48 Maine, 537. But latterly courts are not inclined to extend the rule which makes one a trespasser by relation; and the above author says that, "according to modern English cases, to implicate one as a trespasser *ab initio*, he must do, or consent to, some act which goes to show that the original taking was with the purpose of putting the thing to an illegal use. These decisions rest upon the avowed ground of narrowing, to the utmost, the doctrine of making officers and others trespassers by means of some technical irregularity in the detail of their duties." Section 492.

In *Stoughton v. Mott*, 25 Vt., 668, will be found a very

C., M. & St. P. R'y Co. vs. B'd of Sup'rs of Crawford Co. and others.

learned and full discussion of this question by REDFIELD, C. J., where many of the authorities are cited and commented on. See, also, *Eaton v. Cooper et al.*, 29 Vt., 444, where the same distinguished jurist, in delivering the opinion of the court, in effect states that "the taking of property by virtue of a writ of attachment may be justified by the officer and creditors' attorney, without showing regular subsequent proceedings in obtaining judgment, taking out execution," etc. But, without spending more time upon the question, we will say that the cases generally tend to support the proposition laid down in *Gates v. Lounsbury*, 20 Johns., 427, that "when an act is lawfully done, it cannot be made unlawful unless by some positive act incompatible with the exercise of the legal right to do the first act." In the light of these authorities it is impossible to say, upon the evidence in this case, that the defendant can be held liable as a trespasser from the beginning, because the justice lost jurisdiction of the attachment suits through failure to give the requisite notice to the attachment defendant. The case of *Bromley v. Goodrich*, 40 Wis., 131, is so dissimilar to this in its facts that it is readily distinguishable. This view of the law is decisive of this case, and results in a judgment of affirmance.

By the Court. — The judgment of the circuit court is affirmed.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
VS. THE BOARD OF SUPERVISORS OF CRAWFORD COUNTY
and others.

March 9 — March 30, 1880.

RAILROADS. *Exemption of property of railroad companies from local taxation.*

1. Where property is necessarily used by a railway company in operating its road, it is not required, in order to exempt it from local taxation (under subd. 13, sec. 2, ch. 130, Laws of 1868), to be used *exclusively* for railway purposes, but it is sufficient if that is clearly shown to be its *principal* use.

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2. Thus, where it appears that it was necessary, in 1873, for the proper accommodation of persons traveling by defendant's railway, that defendant should maintain an eating and lodging house for them at Prairie du Chien, adjacent to its road, and that a certain building owned by defendant, upon its land adjacent to its road, was principally used for that purpose, more than nine-tenths of its business, probably, consisting in furnishing entertainment to travelers by and employees upon said railway, it is held to have been exempt from local taxation; and the facts that plaintiff's tenant (not charged with rent) by whom it was conducted, took the profits thereof, and that commercial travelers, reaching and leaving Prairie du Chien by railroad, were entertained at the house for one or more days while transacting their business in that vicinity, will not prevent such exemption, where the house was not kept as a general hotel for the accommodation of the whole public. *M. & St. P. Railway Co. v. City of Milwaukee*, 34 Wis., 271, followed; and *M. & St. P. Railway Co. v. Board of Supervisors*, 29 id., 116, distinguished.

APPEAL from the Circuit Court for *Dane* County.

About the year 1870, the plaintiff brought an action against the defendant board of supervisors and certain public officers to restrain the collection and for the cancellation of taxes for the years 1868 and 1869, assessed against certain of its lots on or contiguous to its depot grounds in the city of Prairie du Chien, occupied by a building known as the "Dousman House," which it was claimed were necessarily used for the accommodation of travelers upon its railway, and therefore exempt from local taxation. The case came to this court, and is reported in 29 Wis., 116. The same property was assessed and taxed in 1873, and sold in 1874 for nonpayment of such taxes; and this action was brought in April, 1876, to set aside and cancel the tax certificate issued on such sale.

The pleadings in the two actions are similar. A sufficient statement of the pleadings in this action is contained in the brief of counsel for the defendant, as follows:

"The ground of the action is, simply, that the property was included within the exemption granted by the thirteenth subdivision of chapter 130, Laws of 1868, because a part of the plaintiff's depot grounds at Prairie du Chien, and 'necessarily used in operating the plaintiff's railroad.'

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"The defenses pleaded by the answer are two: the *first*, that the property in question was not a part of the depot grounds, nor necessarily used in operating the railroad, but was distinct and separate from the depot grounds, and used and employed as a public inn or hotel, at which all travelers desiring entertainment were received, and had the right to be, and in connection with which hotel was a saloon and billiard room, open to all, and also a large stable for keeping horses, the whole enclosed together by a fence, and entirely separate and distinct from the depot, ticket-office, passenger waiting-room and other buildings of the company, at and upon its depot grounds, and leased to Mr. J. F. Williams, who managed and conducted the same as a business for his own profit and advantage; the *second*, that in 1870 the plaintiff brought a similar action against the defendants, the county board and the other public officers for collection of taxes, upon the same grounds and in respect to the same property, to set aside the taxes levied thereon in 1868 and 1869, in which it was adjudged that the premises were not exempt, which judgment was affirmed by this court, and that there was, in 1873, no change since 1868 in the situation and uses of the property, and the plaintiff was estopped by such former judgment from maintaining this action."

The findings of fact are as follows:

"That the property described in the complaint was, in the year 1873, occupied by a hotel known and called by the name of the 'Railway Hotel;' that the same was, during all that year, occupied by J. F. Williams as a tenant under the said plaintiff, and was used and kept by him as a hotel and railway eating and lodging house, for the use of travelers on the plaintiff's road; that the lots described in the complaint were all appropriated to the use of such hotel as part of its grounds and conveniences, and form part of the hotel property; that the said hotel was built by the plaintiff, and was, by the manner of its construction, designed for, and was during the year

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1873 appropriated to the uses of, a hotel, by the landlord thereof, said Williams, soliciting and receiving all such guests as desired entertainment thereat, whether coming by the plaintiff's railway, or by any other modes of conveyance of any sort, and whether arriving for the purpose of taking passage elsewhere on the plaintiff's railway or upon any other conveyance; and that, although meals were furnished regularly to passengers stopping only for such meals when in transportation on the plaintiff's railway, all guests and passengers were received and entertained for whatever period of time they chose to stop at said hotel as guests, but he did not keep resident boarders; and that, in short, the said hotel was in all respects conducted as a first-class hotel, except that residents were not kept thereat. Although said hotel was built with the object principally to accommodate railway travel, it was also designed to embrace the accommodation and entertainment of all persons who might desire entertainment thereat as guests in the ordinary manner of a hotel.

"That the said hotel is a large building, comprising office, reception room, drawing room, and all the other usual convenient rooms of a good hotel, and 57 sleeping rooms, about 40 of which were used as guest rooms, and cost to construct about \$50,000; that it had in 1873 a saloon and billiard room, inviting custom from all, whether coming or going by rail, or not traveling at all; that the said hotel and lots, described in the complaint, are substantially enclosed on three sides by a fence, and thereby separated on those sides from connection with the other property of the plaintiff.

"That about 150 feet distant is the passenger depot of the plaintiff at Prairie du Chien, in which are the usual waiting rooms for men and for women, ticket office, baggage room, and the usual conveniences of a depot in the usual form.

"That the main track of the railroad and several switch tracks are laid in the street in front of block 24, on which the hotel property and the passenger depot are situated; that a

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long platform beside the main track extends from the passenger depot up to and along the front of the hotel, upon which passengers are accustomed to alight from trains, and upon which they may conveniently pass to said hotel; that the said track in no other manner passes by or over the property described in the complaint, nor is said hotel property otherwise connected with said depot grounds or buildings.

"That the said plaintiff derives no rent from the use of said building directly, but to induce the keeping thereof gives the use thereof to said Williams free of rent, and furnishes him firewood; but that said Williams otherwise pays all expenses of keeping said hotel, and enjoys all the gains and profits, and the said plaintiff built and maintains the same, as aforesaid, in the expectation and belief that it derives sufficient profitable returns in the increase of travelers caused thereby to go upon the plaintiff's railroad.

"That said property, in the complaint described, was not at the time in question necessarily used in operating the plaintiff's railroad, except as an eating and lodging house for travelers over its road.

"That the allegations of the answer respecting the former action between the same plaintiff and the defendants, the county board of supervisors of the county of Crawford and the public officers then charged with the collecting of taxes, are all true as made; that said action was brought for the same purpose as the present, and involved precisely the same inquiry, namely, the taxability of the property described in the complaint, which was in that action claimed by said plaintiff to be exempt from taxation for the same reason that the same is now claimed; that the only substantial difference between the two cases is, that in the former action the taxes levied in the years 1868 and 1869 were sought to be set aside, and in this action the tax levied in 1873 is sought to be set aside; that, however, there was no essential change in the condition, purposes, management, use, situation or circumstances of said

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property in 1873 from the same in 1868 and 1869, and the facts of both cases are in every essential particular alike.

"And, except as above modified and particularly stated, the answer is found to be true."

As conclusions of law the court held: "That the plaintiff is not entitled in law to maintain this action; that the property described was duly assessed and taxed, and not exempt therefrom, in the year 1873; and that the plaintiff is barred of all right to maintain this action, and the defendants should have judgment accordingly, dismissing the plaintiff's action on the merits, and for the recovery of their costs to be taxed."

The opinion sufficiently states the testimony.

From a judgment for the defendants dismissing the complaint, the plaintiff appealed.

For the appellant, there was a brief by *Melbert B. Cary*, its attorney, with *John W. Cary*, of counsel, and oral argument by *John W. Cary*.

For the respondent, there was a brief by *Vilas & Bryant* and *Wm. H. Evans*, District Attorney of Crawford county, and oral argument by *Wm. F. Vilas*.

LYON, J. In the action brought by the present plaintiff against the defendant board of supervisors and others, to restrain the collection of taxes assessed in 1868 and 1869 upon the property known as the Dousman House (being the same property affected by this action), the controlling finding of fact was as follows: "*Fourth*. That in the Dousman House, the front rooms thereof in the lower story are used as an office and ladies' sitting room; that the dining room is on the same story; that there is a saloon and billiard room in the basement; that the two upper stories are used for a parlor and sleeping rooms; that said Dousman House is occupied by one J. F. Williams; that said Williams pays no rent for said building; that most of the travelers on the said road eat their meals at said Dousman House; that all travelers and guests

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are accommodated at the Dousman House as at other hotels; that citizens have been boarding at the house for the last three or four years."

The case reached this court, and is reported in 29 Wis., 116. The court was of the opinion that the evidence sustained the above finding, and established the fact that, notwithstanding the house was used, in certain specified particulars, for the accommodation of travelers on the plaintiff's railway, it was "open and kept and used for the accommodation of all guests and travelers, whether they are such as arrive and depart by railway carriage over the company's road, by boats navigating the Mississippi river, or by any other mode of public or private conveyance or travel. It is a public house or inn, alike open, and so kept and intended to be, for the entertainment and lodging of all who may apply, and in nowise differing from any other establishment of the kind, except in the particulars above stated." The judgment of the circuit court dismissing the complaint was accordingly affirmed, on the ground that the house was kept as a hotel for the accommodation of the whole public, and not distinctively for the accommodation of travelers by the railway of the plaintiff, although incidentally such travelers were accommodated thereat.

In the case of *The Mil. & St. P. R'y Co. v. The City of Milwaukee*, 34 Wis., 271, we had occasion to consider further the statute exempting certain property of railway companies from local taxation, and to explain the decision in the case first above cited. This is what is there said of that case: "In the case above cited (*Railway Co. v. Supervisors, etc.*), we had occasion to construe this exemption law, and we there held that a building which was used *principally* as a hotel, and was kept in the manner hotels are usually kept, for the accommodation and entertainment of all persons, whether travelers upon the railway or not, together with the outbuildings and enclosures necessary to a hotel, and the land covered thereby and included therein, were not exempt from taxation under

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this law, although the hotel was adjacent to the railroad track, and was owned and controlled by the company, and portions of it were used as a station house or depot for the accommodation of travelers on the railroad of the company. The decision was put upon the ground that it is not usual or necessary for railway companies to carry on a general hotel business, and hence that the property was not *necessarily* used in operating the railroad, within the meaning and intent of the statute. That case also decides that if the property is *principally* used for a purpose not necessary to the operating of the railroad, and if to a small extent only it be *necessarily* used in operating the road, it is not within the exemption of the statute."

This explanation was thought necessary because there is some language in the opinion which might, unexplained, convey the idea that the premises would not be exempt from local taxation unless used *exclusively* for the accommodation of travelers upon the plaintiff's railway, and we did not intend to be so understood. The same principle was applied in that case, wherein it was held that certain freight or warehouses of the railway company were within the exemption of the statute because they were used *principally* for a purpose necessary to the operation of the railroad, although they were, to some extent, in charge of agents of propeller lines, who stored in them some goods received from propellers and consigned to parties in Milwaukee, and who collected storage charges thereon.

It was said in *Railway Co. v. Supervisors*, that it appeared by the testimony "that the erection and maintenance by railway companies, at suitable places along the lines of their roads and contiguous thereto, of station houses or buildings in which passengers may be properly and comfortably supplied and entertained with food and lodging as at hotels, is a necessity of modern railway travel;" and further, that such an establishment was necessary and proper at Prairie du Chien.

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Indeed, it requires but little proof to show the necessity for such establishments at proper points, or that the point where a great railway line crosses the Mississippi river is one of these.

The question, the answer to which is decisive of the case, is, Does the evidence prove that the building in question was, during the year 1873, used *principally* as an eating and lodging house for the accommodation of travelers upon the plaintiff's railway? We think this question must be answered in the affirmative. The evidence is practically undisputed, that a very large proportion of the business of the house — probably more than nine-tenths of such business — consisted in furnishing entertainment to such railway travelers, and to plaintiff's employees on its railway. Other persons may have been entertained there occasionally, but cases of that kind are exceptional. There is considerable testimony to the effect that commercial travelers reaching and leaving Prairie du Chien by railroad were entertained at the house in question for one or more days while transacting their business in that vicinity. We are not prepared to say that this is objectionable, or that it tends to show that the house was kept as a general hotel for the accommodation of the whole public. Excluding cases of this class, and cases of persons stopping at the house as invited guests of Mr. Williams, the evidence showing that persons not travelers on the plaintiff's railway were entertained there is very meagre.

It is quite apparent that, to some extent, the learned circuit judge predicated his findings upon the similarity between this case and the case in 29 Wis., 116. There are many circumstances and conditions common to the two cases. This is necessarily so. But the controlling fact found in the former case, to wit, that the Dousman House was kept *principally* as a hotel for the general public, and only incidentally for the entertainment of travelers upon plaintiff's railway, is wanting here. That was the use to which the building and its appur-

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tenances were chiefly put in 1868 and 1869, while in 1873 it is satisfactorily proved that the same property was chiefly — almost entirely — used for the accommodation of railway travelers.

It is scarcely necessary to say that the judgment in the case in 29 Wis. cannot have the effect of an estoppel in the present case. The taxability or non-taxability of the property depends upon the manner in which it is used. One mode of user renders it taxable; another mode exempts it from local taxation; and the use may change every year. Hence, because upon a given state of facts the property was adjudged to have been taxable in 1868 and 1869, it by no means follows that it must, upon another and different state of facts, be adjudged taxable in 1873.

To avoid any misapprehension of the scope and effect of our judgment in this case, it is deemed proper to say that in determining whether, in a given case, an establishment is a general hotel for the accommodation of the whole public, or whether it is chiefly kept for the accommodation of railway travelers, the court will not enter into any nice mathematical calculation of the relative amount of each class of business transacted at such establishment in order to determine its real character. If a railway company allows these establishments to be carried on in competition with other hotels for the general hotel business of the country, it does so at its peril that the property will be held taxable in the usual manner.

After the decision of the former case, several changes were made in the mode of conducting the house. Boarders, as distinguished from guests, were no longer kept. The horses of guests were no longer stabled for hire as formerly, and the name was changed from "Dousman House" to "Railway House." This change of name may not be a very material circumstance, yet it may have some significance as affecting the good-will of the "Dousman House" as a general hotel. Whether these changes are more or less important, the fact

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remains that through some means, or by force of some agencies, the establishment which in 1868 and 1869 was a general hotel for the accommodation of the whole public, and only incidentally for railway travelers, became in 1873 an establishment *principally* for the accommodation of the latter class.

Some of the findings of the circuit judge are not altogether opposed to the view we have taken of the facts proved in the case. For example, he finds that the establishment was used and kept by Williams "as a hotel and railway eating and lodging house for the use of travelers on the plaintiff's road." Also, that "said hotel was built with the object principally to accommodate railway travel;" and further, that the property "was not, at the time in question, necessarily used in operating the plaintiff's railroad, *except as an eating and lodging house for travelers over its road.*" This is equivalent to finding that it was necessary for the purpose last mentioned.

It is true that in connection with the above findings it is found that the building was built for and used as a general hotel, but it is not expressly found that it was used in 1873 chiefly as a general hotel. We think the opposite fact, to wit, that it was used during the year principally for the accommodation of railway travelers, should have been found; and the existence of that fact entitled the plaintiff to the relief demanded.

By the Court.—The judgment is reversed, and the cause remanded, with directions to the circuit court to grant the relief demanded in the complaint.

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March 10 — March 30, 1880.

CITIES: HIGHWAYS. *What sidewalks cities are bound to keep in repair.*

In cities of this state, the use, for a series of years, by the people traveling on foot along a public highway, of a part of such highway as a sidewalk or foot path, on one or both sides of the carriage way, constitutes such path or walk a portion of the "traveled part" of such highway, which the city is bound to keep in repair and in safe condition for such use, and renders the city liable for injuries resulting from a neglect of that duty.

APPEAL from the Circuit Court for *Columbia County*.

Defendant appealed from a judgment in plaintiff's favor. The case is stated in the opinion.

For the appellant, there was a brief by *E. S. Baker*, its attorney, with *A. Scott Sloan*, of counsel, and oral argument by *Mr. Sloan*.

For the respondent, there was a brief by *Harvey Briggs*, his attorney, with *J. G. Flanders*, of counsel, and oral argument by *Mr. Flanders*.

TAYLOR, J. The plaintiff brought his action to recover damages against the appellant for an injury sustained by him, which he alleges was caused by a defect in the sidewalk of one of the public streets of said city, which sidewalk, he also alleges, it was the duty of said city to keep in repair.

There is no question made as to the fact that the sidewalk was out of repair, nor is it seriously contended that the injury of which the plaintiff complains was not caused by that fact. The real question in the case is, whether the city is liable for an injury caused by the want of repair of a sidewalk in one of its public streets, when such sidewalk has neither been constructed nor ordered to be constructed by the city or its proper officers, and when no work has been done or ordered to be

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done by the city or its officers in the construction, maintenance or repair of such walk.

The evidence shows that the place where the accident occurred was within the limits of one of the streets designated upon the city plat as a public street; that it had been used as a public street of said city for several years before the time of the accident, for travelers on foot and with teams and carriages; that during all those years that part of the street along the east side thereof, and where the accident occurred, had been used as a footway or sidewalk for persons traveling on foot along said street; that portions of said footway or sidewalk in the vicinity of the place where the accident happened, had been planked by the owners of the adjacent lots as a sidewalk; and that in other places, and at the place where the accident happened, the walk had never been planked as a sidewalk, but the surface of the ground remained very nearly in its natural state. There was no proof tending to show that the portions of the sidewalk which had been planked by the adjacent lot-owners had been so planked by the order or direction of the city or its officers; and we think, for the purposes of this case, it must be assumed that such planking was done by the owners without any direction or order from the city or its authorities, and that it must also be assumed that the city never had done any work upon the sidewalk in the immediate vicinity of the place where the accident happened.

Under this state of the evidence, it is insisted by the learned counsel for the appellant that the city cannot be held responsible for any injury occurring by reason of any defect or want of repairs in such footway or sidewalk; that the mere fact that the travelers on foot in one of the small cities of the state had for years traveled along the side of one of its public streets, in the place where it is usual and customary for travelers on foot to travel when passing along such streets, does not impose any duty upon such city to keep such part of the street so traveled by footmen in repair. After a careful consideration of the

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case, we think the learned counsel is mistaken as to the extent of the duty imposed by the laws of this state upon the cities thereof to keep their streets in repair. It must be admitted that the charter of the city does not expressly charge the city with the duty of maintaining sidewalks along the sides of the public streets of such city. The charter, in fact, provides that the city shall not have authority to grade or gravel any street, or construct any sidewalks along its streets, without the consent of two-thirds of the adjacent lot-owners, when the expense thereof is to be charged to such lot-owners. Chapter 93, P. & L. Laws of 1858, subch. VI, § 1. But the charter provides for the collection of a poll tax for the purpose of keeping its streets in repair, and also allows the city to levy a tax for that purpose, in the same manner and to the same extent that towns may do. See section 7, subch. VII of said ch. 93, P. & L. Laws of 1858.

The duty of the city to keep its streets in repair, and the consequent liability to travelers injured by reason of the want of such repair, are imposed by the general laws of the state, and not by the city charter. Section 120, ch. 19, R. S. 1858; Tay. Stats., p. 513, § 156. This court has repeatedly held that this section applies to all cities as well as towns situate in this state. *Kittridge v. Milwaukee*, 26 Wis., 46; *Harper v. Milwaukee*, 30 Wis., 365; *Weisenberg v. Appleton*, 26 Wis., 56; *Johnson v. Milwaukee*, 46 Wis., 568; *Prideaux v. Mineral Point*, 43 Wis., 513; *Colby v. Beaver Dam*, 34 Wis., 285. The revision of 1878 makes that certain by express statute, which this court had rendered certain by numerous decisions construing the former law. Section 1339, R. S. 1878. It having been settled beyond controversy that the cities are responsible for any injury occurring to travelers by reason of any defect in their public streets, the only questions to consider are, whether the place where the injury was sustained in this case was within one of the public streets of said city; whether the particular place where said accident occurred

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within said street was a part thereof which the city was bound to keep in repair; and, if so, whether that place was out of repair, and such want of repair caused the injury complained of.

We think all these questions were properly answered in the affirmative by the jury, upon sufficient evidence, and the only real contention made by the learned counsel for the appellant, in his argument in this court, is, that the particular place where the accident happened and the defect existed was not a part of the public highway which the city was bound to keep in repair. The argument is, that the city was under no obligation to provide a sidewalk or footway alongside of the carriageway of one of its public streets for the convenience of foot travelers; and that, as the city had not made or ordered the sidewalk or footway, used by the travelers on foot, to be made, and had not assumed to control or repair the same, it was in no way obligated to see that the same was reasonably safe for the passage of travelers on foot; that the adoption of that part of the street as a footway by the public, and its use as such for a series of years, imposed no duty upon the city to keep that particular part of the street in repair. It is urged that, outside of the cities, towns would not be required to keep a footway in repair for the convenience of travelers on foot alongside of one of their public highways, and that no length of use of a footway alongside of such a highway would render the town liable for an injury occurring from a defect therein, if that part of the highway prepared for and used by carriages was in a safe condition for the use of footmen.

For the purposes of this case it may be admitted that a town would not be liable in such case; still such admission is by no means decisive of the present case. In towns there are comparatively few persons who travel on foot, and it is not necessary that a particular portion of a highway should be set apart for the use of foot travelers. In cities, even in small ones, it is customary and highly convenient, if not absolutely

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necessary, that a portion of the public street should be set apart for the use of footmen; and it is an exception to the general rule when a public street in a city has not a portion of it set aside exclusively for travelers on foot. And, by a reference to any city charter passed by the legislature of this state, it will be found that such charters uniformly contain provision for making and maintaining sidewalks along the sides of the public streets of such cities, thus showing that it is contemplated that in cities sidewalks for foot travelers will be maintained alongside some, if not all, of the public streets in such cities.

If, then, a street in a city is adopted or laid out and opened as a public highway for all kinds of travel thereon, and, without any direction or interference of the city or its authorities, a portion thereof alongside of the part used for teams and carriages is used by the people who travel on foot as a footway or sidewalk, that part so used becomes as much a part of the traveled part of such street as that used for the passage of teams and carriages; and all the cases hold that towns and cities are liable for defects in the traveled part of the highway, when such traveled part is within the limits of the way, unless some barrier is put up or warning given to the public to avoid such traveled portion, or direction given to use only that part of the way which the town has prepared for the public use. See *Seward v. The Town of Milford*, 21 Wis., 485; *Kelley v. The Town of Fond du Lac*, 31 Wis., 179-186; *Johnson v. City of Milwaukee*, 46 Wis., 568. In this last case it is expressly held that if a portion of a public highway becomes a thoroughfare, whether by the action of the city authorities or by that of private individuals, it becomes the duty of the city to see that it is kept in safe condition. In that case a private person had placed a bridge over the gutter on his side of the street opposite his place of business for the purpose of attracting persons crossing the street to his place, and, such bridge being out of repair, the plaintiff fell

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on the same and was injured. This court sustained a verdict against the city, and Justice COLE, delivering the opinion, says: "If that crossing, including this bridge, platform or apron, as it is called, was in fact a thoroughfare in constant use by the public, the city was bound to keep it in repair, and was responsible to a person injured by reason of its failure to perform that duty, whether the city originally built the bridge or not. The correctness of this view would seem to be too obvious to need comment or illustration; for surely the responsibility or irresponsibility of the city to keep a thoroughfare, or, in other words, a public crossing, in repair, cannot be made to rest or depend upon the fact that the city built it in the first place, or authorized it to be built." See, also, *Green v. The Town of Bridge Creek*, 38 Wis., 449, 461; *Houfe v. Town of Fulton*, 34 Wis., 608, 615; *Matthews v. Baraboo*, 39 Wis., 674, 677.

We hold, therefore, that in cities, where it is customary for travelers on foot to use for that purpose a portion of the public streets on one or both sides of the track which is used for carriages and teams, as a footway or sidewalk, the use of such footway or sidewalk by the people traveling along a public street in any such city, for a series of years, constitutes such footway or sidewalk a part of the traveled part of such street, and imposes upon the city the duty of keeping such footway or sidewalk in repair; and if the same becomes so defective as to render travel over the same unsafe, and the city takes no measures to warn the public against the use of such footway, the city becomes liable to any traveler who may suffer an injury from such defective footway without his fault.

We have examined the other exceptions taken to the instructions given by the circuit judge, and the exceptions taken to the refusal of the judge to give the instructions asked by the defendant, and find no errors which would justify us in reversing the judgment.

By the Court.—The judgment of the circuit court is affirmed.

Van Slyke vs. The Trempealeau County Farmers' Mut. Fire Ins. Co.

VAN SLYKE VS. THE TREMPÉALEAU COUNTY FARMERS'
MUTUAL FIRE INSURANCE COMPANY.

March 10 — March 30, 1880.

MUTUAL FIRE INS. CO. *Charter construed. Who members of the company on its first organization.*

Under ch. 374, P. & L. Laws of 1870, the secretary of the defendant company, who was its general agent for that purpose, received applications of more than fifty persons for insurance and membership in the company, accompanied by their premium notes, etc.; and plaintiff's application and premium note were so received, and his due bill for the ten per cent. and fees required to be paid in advance was accepted by the secretary; and the board of directors thereupon completed the organization of the company. *Held*, that plaintiff (like all other persons whose applications, etc., had been so received up to the time of such organization) was a member of the company, liable to assessment for the payment of subsequent losses of other members, and entitled to a policy upon the property described in his application; although the directors had not formally approved of such application, or indorsed their approval thereon, as required by the by-laws adopted on the day of such organization.

APPEAL from the Circuit Court for *Columbia County*.

Action upon an alleged contract of insurance against loss by fire. The case is stated in the opinion; but it may be further observed, 1. That one of the by-laws adopted by the board of directors at their meeting of February 17, 1872, was in these words: "Sec. 21. Applications for insurance, or for any change in the policy of insurance, in all cases shall be passed upon and approved or rejected by at least two directors, whose names shall be indorsed thereon." 2. That it appears from the evidence of the secretary of the defendant company, that in respect to the fifty-nine applications received by him before the meeting of February 17, 1872, the directors took no action, either of approval or disapproval, until March 8th of the same year.

The plaintiff appealed from a judgment of nonsuit.

Van Slyke vs. The Trempealeau County Farmers' Mut. Fire Ins. Co.

For the appellant, briefs were filed by *Cameron, Losey & Bunn*, and there was oral argument by *Mr. Bunn*.

Lloyd Barber, for the respondent.

ORTON, J. The respondent company was incorporated by chapter 374 of the P. & L. Laws of 1870. The first section of the act names the persons who are authorized to take the necessary measures to appoint officers, open books and receive applications for insurance, and to complete a full organization of the company.

It appears in evidence that one Isaac Clark was secretary and general agent of the company to receive such applications, accompanied by premium notes, from residents of said county, for the purpose of such full organization, and that the appellant, who was a resident of the said county of Trempealeau, on the 27th day of January, 1872, signed a written application for insurance upon the property burned, and gave his premium note therefor, in the form required, and presented and gave his due-bill for the per cent. and fees required to be paid in advance. And it further appears that the appellant was one of more than fifty applicants for insurance in the same form, and for the same purpose, up to and before the 17th day of February, 1872; and that on that day there was a meeting of the directors, called for the purpose of completing the organization of the company and adopting by-laws, at which the following proceedings were had: "On motion, the by-laws were read and adopted, as recommended by a previous committee appointed for that purpose. On motion, the following preamble and resolutions were adopted: 'Whereas an act passed by the legislature, and approved March 15, 1870, authorizing the citizens of Trempealeau county to organize a mutual fire insurance company, known by the name of Trempealeau County Farmers' Mutual Insurance Company, upon certain conditions that the company shall number fifty members before they are fully organized; and whereas the com-

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pany has now the required number, and many more: therefore, *Resolved*, that the company proceed to issue policies in accordance with the law and by-laws of said corporation.' ”

On the next day after this formal organization of the company, the property was destroyed by fire; and the appellant gave the secretary of the company notice thereof soon after the fire, and made out and presented to him his proofs of loss. On the eighth day of March thereafter, the directors of the company rejected the application of the appellant, and within a month or so thereafter returned to him his application, premium note and proofs of loss, which he refused.

Many of the questions raised seem to us to be disposed of by the charter of the company. Section 21 of the act provides that “any person being a resident of the county of Trempealeau may become a member of this company by subscribing his name to such application therefor as the company may provide and use in making insurance, and paying the secretary a fee of \$1.50, and also ten cents on each \$100 insured.”

There can be no question but that the appellant substantially complied with this provision, and thereby became a member of the company to all intents and purposes, and bound. He could not withdraw such application and premium note if he would, for his premium note became a part of the only fund the company had out of which to pay losses. Sections 23, 25 and 26 provide for the assessment of each applicant for insurance upon his premium note proportionably, to pay losses, and in analogy to the general statute relating to mutual fire insurance companies, passed at the same session of the legislature, in which there is a similar provision for organization when and after a certain number of applications are made and premium notes given, and that such notes “shall remain as security for all losses and claims,” etc. It may be that the directors of the company might have the authority to reject any one of these original applications and

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refuse to receive it or the premium note offered, for good reasons; but such authority should be exercised at the time, and before the applicant becomes bound as a member of the company. The secretary had the right to receive the appellant's application and premium note, and waive, if he saw fit, the payment in money down of his fee and the per cent.; for he was, in the largest sense, and is made so by the charter, for receiving these applications, the general agent of the company; and there can be no question in this case that he has done so.

Section 44 provides that "no claim for loss or damage by fire which may occur previously to the company numbering fifty members, or possessing a capital of \$25,000, shall be valid against said company, and no person shall be liable to tax for losses or damage by fire which may have occurred prior to the date of his or her membership." It is quite obvious, if no other reason were apparent, that this provision, that the company shall not be liable for losses occurring before the company numbers fifty members, is tantamount to providing that for any loss by fire, to any of the members, *after* the company numbers fifty members, the company shall be liable; and this provision can relate only to such members as had become such by just such application and premium note as the appellant had given in this case.

It is objected that the directors had not formally approved of this application, and, according to the by-law cited, indorsed such approval thereon. In answer to this objection it is sufficient to say that the charter requires no such approval, and the by-law was not adopted until the fifty applications had been made, of which this was one. It is sufficient, so far as the rights of the appellant are concerned, that his application was one of the number by reason and by *virtue* of which the company became fully organized, and he had the same rights as any other of the members.

It was not shown that his application was *disapproved* until

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long after the fire, and it appears that for a long time after such disapproval, on the 8th day of March, the company still held on to his application and premium note; and if any other loss had occurred in the mean time, there can be no question but that the appellant would have been liable to pay, to meet the same, his proportion, by assessment upon his premium note.

The authority of the secretary, as general agent of the company, appears by the charter to be *paramount* in receiving these first applications and premium notes, preliminary to the full organization of the company after having received fifty of the same; but, even as the general agent of the company, his authority to waive any of the conditions of the policy has been too often decided by this court to bear an argument. The right of the appellant to a policy of insurance in form was perfect and complete on the 17th day of February, the day before the fire, and his rights and liabilities were unalterably fixed, and it makes no difference that the policy had not been formally issued before the fire. *May on Ins.*, 41, 42; *Eames v. Ins. Co.*, 94 U. S., 621; *Insurance Co. v. Webster*, 6 Wall., 129; *Fried v. Royal Ins. Co.*, 50 N. Y., 243; *Palm v. Insurance Co.*, 20 Ohio, 529.

It appears to us that by every reason, and by all authorities, the respondent company became liable to pay for this loss, upon the evidence as reported; and at all events that the case should have been submitted to the jury.

By the Court.—The judgment of the circuit court is reversed, with costs, and the cause remanded for a new trial therein.

Hall vs. The State.

HALL VS. THE STATE.

March 11—March 30, 1880.

Criminal law and pleading.

In charging an offense under sec. 4410, R. S., where it is alleged that the intent of the breaking and entry was to commit a *larceny*, it is not necessary to allege the *value* of the goods which the accused intended to steal.

ERROR to the Municipal Court of *Milwaukee* County.

Hall, having been convicted upon a criminal information under sec. 4410, R. S., took a writ of error to reverse the judgment.

Henry L. Buxton, for the plaintiff in error, cited *Ford v. State*, 3 Pin., 449; *People v. Murray*, 8 Cal., 519; *Carpenter v. Nixon*, 5 Hill, 260; *Shay v. People*, 22 N. Y., 317.

The Attorney General, for the state, contended that there was no need to allege the kind or value of the goods intended to be stolen. 2 Bishop's Crim. Pro., sec. 142; *Hunter v. State*, 29 Ind., 80; *Larned v. Commonwealth*, 12 Met., 240; *Comm. v. Williams*, 2 Cush., 582; *Bell v. State*, 20 Wis., 600; *Portwood v. State*, 29 Tex., 47. Larceny, grand or petit, is a felony at the common law. 3 Chitty Cr. Law, 924; 4 Black. Com., 95. When used in our statutes, the term "felony" is to be construed as meaning an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in a state prison. R. S., sec. 4637. The same definition is found in the revision of 1849. This provision defines statute felonies, but does not interfere with those existing at common law untouched by the statute, of which petit larceny is one. *Ward v. The People*, 30 Hill, 395, cited approvingly in *Wilson v. State*, 1 Wis., 163.

LYON, J. The only question in this case is, whether an information for an offense under section 4410, R. S., p. 1046,

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is sufficient, the charge therein being that the accused broke and entered a certain dwelling-house in the day-time with intent feloniously to steal, take and carry away therefrom the goods and chattels of the owner. Counsel for plaintiff in error contends that petit larceny is not a felony under the statute definition of a felony (R. S., 1088, sec. 4637), and that the use of the term "or *other* felony," in section 4410, plainly implies that only such larcenies are intended as are felonies, that is, punishable by imprisonment in the state prison. Hence, the learned counsel ingeniously argues that the information should allege the value of the goods which the accused intended to steal, so that it may appear whether he intended to commit a felony, and that the information is bad if it fails to charge an intent to commit an offense punishable by imprisonment in the state prison.

We are unable to give the statute the construction contended for. The statute must be read as though, instead of the words "or other felony," it had been written "or any other offense for which the offender, on conviction, shall be liable, by law, to be punished by imprisonment in the state prison." *Nichols v. The State*, 35 Wis., 308. We think the term "or other felony" is not a limitation on what precedes, but is inserted to extend the scope of the section to other offenses not specifically named therein. Thus, an intent to commit arson or mayhem, or to inflict upon some person great bodily harm, and doubtless other offenses, are brought within the section by the use of that term. The intent which the statute makes essential to constitute an offense under it, is, generally, an intent to commit the crime of larceny, and the stealing of one dollar is larceny as completely as is the stealing of \$1,000. Besides, in most cases, where the accused has failed, for any cause, to accomplish his purpose, it would be impossible to prove the extent of the larceny which he intended to commit when he broke and entered the dwelling-house. We do not believe it possible that the legislature ever intended to throw any such

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burden upon the state in the prosecution of offenses under this statute. If it did, larceny should be excepted from the statute; for as a rule no convictions could be had in such cases, however guilty the accused might be, unless his intention was consummated. Our construction of the statute is fully sustained by the authorities referred to by the attorney general. The only case we have seen to the contrary is that of *People v. Murray*, 8 Cal., 519, the doctrine of which we are unable to sanction.

We do not find it necessary to determine whether petit larceny remains a felony as at common law or otherwise. The view we take of the statute under which the information was preferred, renders that question immaterial.

By the Court.—The judgment of the municipal court is affirmed.

HELMS, by guardian *ad litem*, and another vs. CHADBOURNE and another, Executors.

March 11 — March 30, 1880.

New Trial.

On reversing a judgment in this cause, on a former appeal, this court directed that if plaintiffs should satisfy the circuit court that they were able to obtain evidence showing that defendant's testator, when he purchased the land here sought to be redeemed, had notice of plaintiffs' claim of an equity of redemption, it should grant a new trial; and that otherwise the complaint should be dismissed. 45 Wis., 60. When the case was remitted, a new trial was granted upon an affidavit of plaintiffs' counsel that he had seen and conversed with the witnesses, and that plaintiffs could prove, by the most trustworthy and reliable testimony, that such testator had actual notice of their claim before taking his conveyance. *Held*, no error.

APPEAL from the Circuit Court for *Columbia County*.
The case is stated in the opinion.

Helms, by guardian ad litem, and another vs. Chadbourne and another, Ex'rs.

For the appellants, there was a brief by *G. W. Hazelton* and *E. Mariner*, and oral argument by *Mr. Mariner*.

L. S. Dixon, of counsel, for the respondents.

LYON, J. This is an appeal by the defendants from an order of the circuit court granting a new trial of the action. The case was here at a former term, on appeal from final judgment therein for the plaintiffs, and is reported in 45 Wis., 60. The report contains a full statement of the case, which it is unnecessary to repeat here. The judgment was reversed because the record failed to show that Farnham, the defendants' testator and the owner of the lands affected by the action, had notice that the conveyance of such lands by the ancestor of the plaintiffs to Gross & March, the grantors of Farnham, although absolute on its face, was in fact a mortgage.

The contention on the trial was, that certain foreclosure proceedings referred to in the case were constructive notice to Farnham of the true character of the deed; and the circuit court adopted that view. No attempt seems to have been made to prove that Farnham had actual notice thereof; and had the views of the circuit court been sustained, proof of actual notice was not essential to the plaintiffs' right of action. This court was of the opinion that if the plaintiffs could prove such actual notice, or give any reasonable assurance that they could do so, they ought to have the opportunity to make the proof. But, inasmuch as the court was not advised on the subject, instead of ordering a new trial, the case was remanded with the direction which will be found at the close of the opinion by Mr. Justice COLE. By this direction we did not intend to bind the circuit court by the strict rules which obtain when a new trial is sought on the ground of newly discovered evidence, or as a relief from the consequences of mistake, inadvertence, surprise or excusable neglect; but the intention was to vest in that court as ample discretion as this court would have exercised in the first instance, had the proofs upon

Helms, by guardian ad litem, and another vs. Chadbourne and another, Ex'rs.

which the circuit court made the order been properly before us when the case was adjudicated.

The order was made upon an affidavit of plaintiffs' counsel, Judge Dixon, to the effect that he had seen and conversed with the witnesses, and that the plaintiffs can prove by the most trustworthy and reliable testimony that Farnham had actual notice, before he took a conveyance of the land from Gross & March, of the claims of the plaintiffs in and to such lands. Had this affidavit been properly before this court when the case was decided, doubtless a new trial would have been ordered in the first instance. We cannot, therefore, disturb the order of the circuit court, founded on such affidavit, granting a new trial. We understand the order contemplates a new trial of all the issues.

Other questions, relating to the merits of the action, and the regularity of the proceedings preliminary to the order, were discussed by counsel. Matters were also discussed concerning which the record is silent. We think the proceedings which resulted in the order were regular, and we deem it unnecessary further to consider the case. The views above expressed are decisive of the appeal.

By the Court.— Order affirmed.

APPENDIX.

APPLICATION OF MISS GOODELL.¹

April 22 — June 18, 1879.

The previous lack of statutory authority for the admission of women to the bar in this state having been supplied by act of the legislature (subd. 5, sec. 2586, R. S.), this court admits to its bar the female applicant in this case, without considering the question whether, under the constitution of this state, the power to prescribe the rule of admission to the bar is in the legislature or in the court.

ON the 22d day of April, 1879, *I. C. Sloan, Esq.*, moved the court for the admission of *Miss Lavinia Goodell* to its bar as a practicing attorney; and the court took time to consider the motion. Afterwards, on the 18th of June, 1879, the motion was granted, and the following opinion was filed.

COLE, J. On the former application for the admission of *Miss Lavinia Goodell* to the bar of this court, it was held that there was no statutory authority for the admission of females to the bar of any court of this state. 39 Wis., 232. Since that decision was made, the legislature has provided that "no person shall be denied admission or license to practice as an attorney in any court of this state on account of sex" (subd. 5, sec. 2586, R. S. 1878), which removes the objection founded upon a want of legislative authority to admit females to practice. It may admit of serious doubt whether, under the constitution of this state, the legislature has the absolute

¹The publication of this decision, in the reports, has been delayed in the expectation that a dissenting opinion would be prepared by the chief justice. — REP.

Application of Miss Goodell.

and exclusive power to declare who shall be admitted as attorneys to practice in the courts of this state; or whether the courts themselves, as a necessary and inherent part of their powers, have not full control over the subject. It was said by the chief justice, on the previous application, that it was a grave question whether the constitution does not entrust the rule of admissions to the bar, as well as of expulsion from it, exclusively to the discretion of the courts, as a part of their judicial power. But it was further remarked by the chief justice, that the legislature had from time to time assumed the power to prescribe rules for the admission of attorneys, and, when those rules have seemed reasonable and just, it has generally been the pleasure of the courts to act upon such statutes, in deference to the wishes of a coördinate branch of the government, without considering the question of power. A majority of the court are disposed to pursue the same course now, and act upon the statute above cited, waiving for the present the question whether or not the courts are vested with the ultimate power under the constitution of regulating and determining for themselves as to who are entitled to admission to practice. We are satisfied that the applicant possesses all the requisite qualifications as to learning, ability and moral character to entitle her to admission, no objection existing thereto except that founded upon her sex alone. Under the circumstances, a majority think that objection must be disregarded. *Miss Goodell* will therefore be admitted to practice in this court upon signing the roll and taking the prescribed oath.

By the Court. — So ordered.

RYAN, C. J., dissented.

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ABATEMENT OF ACTION.

See ADMINISTRATORS, etc., 1. PRACTICE, 4.

1. Whether, under ch. 96, Laws of 1873 (now sec. 2680, R. S.), which provides that, in an action by husband and wife for injuries to the person of the wife, plaintiffs "*may claim in the complaint, prove and recover, all the damages sustained by both, and which might otherwise be recovered by separate actions,*" the husband, after a recovery in a joint action for the injuries to the wife, is barred from maintaining a separate action for the loss of her services, expenses of medical attendance, etc., and whether the pendency of such joint action would be a good plea in abatement of the separate action — is not here determined. *Meese v. City of Fond du Lac*, 323
2. The joint action by husband and wife for personal injuries to the wife abates by her death; and the husband may then bring a separate action for loss of services, etc. *Ibid.*

ACTION.

- (A.) *Cause of Action.* See ABATEMENT. AGENCY. ATTACHMENT, 3-7. BILLS AND NOTES, 5, 6. CITIES, 1. CONTEMPT, 7, 8. CONTRACTS, 4, 5. EQUITY, 16. FRANCHISE. HABEAS CORPUS. HIGHWAYS, 1, 4. REPLEVIN.
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1. The objection that leave to sue an administrator's bond has not been obtained, must be taken by special plea in abatement. *Johannes, Co. Judge, v. Youngs et al.*, 101
2. A petition having been presented to the probate court for leave to sue an administrator's bond, the judge indorsed upon a certified copy of such bond an order or certificate reciting that it appeared to his satisfaction that the petitioner was a creditor of the estate, and that the administrator had neglected to file an inventory or to render an account as required by law (these being the facts alleged in the petition), and that, on the petitioner's request, he authorized an action to be brought on the bond. *Held*, a sufficiently formal authority. *Ibid.*
3. The authority thus granted was for an action under sec. 4 (and not sec. 2), ch. 104, R. S. 1858. *Ibid.*
4. Even if the county judge could revoke such an authority after suit commenced, the objection that he had done so cannot be taken after going to trial on a plea in bar. *Ibid.*
5. Whether, under the present revised statutes, the judgment against the administrator, for a breach of his bond, should be for the penalty therein named, *quære*. *Ibid.*

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See INSURANCE AGAINST FIRE, 10.

Where a disputed claim was presented to the agent of the alleged debtor, in charge of his business and authorized to pay his debts, which claim was probably not enforceable by suit but rested only in moral obligation, and it was presented in good faith, without fraud or misrepresentation, and the agent, with knowledge of all the material facts, compromised the claim, and settled it by payment of a smaller sum: *Held*, that the principal could not recover the sum paid. *Bergenthal v. Fiebrantz*, 435

AMENDMENT.

(A.) *Of Pleading*. See VARIANCE.

An action to enforce a lien given by statute for tolls on logs run through plaintiff's dam, is an action at law on contract (*Marsh v. Fraser*, 27 Wis., 596). In such an action against X and Y, the complaint, alleging

that X owned the logs and that Y had some claim upon or interest in them, demanded a personal judgment against X for the amount of the tolls, and that the same be declared a lien upon the logs. It appearing on the trial that Y owned the logs, and the action being dismissed as to X, it was an abuse of discretion to refuse plaintiff permission to amend the complaint so as to demand a personal judgment against Y. *Tewksbury v. Bronson et al.*, 581

(B.) *Of Petition for Mechanic's Lien.* See MECHANIC'S LIEN, 1.

(C.) *Of Proceedings.* See GARNISHMENT, 4, 7.

APPEAL.

(A.) *To Supreme Court.* See BILL OF EXCEPTIONS. COSTS, 1-3. JUDGMENT, (1). PARTITION, 2. STAY OF PROCEEDINGS, 1, 2.

1. Where the court directed the jury to find for the plaintiff, and the bill of exceptions is not certified to contain all the evidence, it is presumed that there was evidence conclusively establishing plaintiff's right to recover, even though the evidence preserved in the record has some tendency to disprove such right. *Kollock v. Stevens Point*, 37 Wis., 348, distinguished. *Edwards v. Smith*, 254
2. A demurrer to the complaint having been stricken out as frivolous, with leave to answer within a limited time on terms (R. S., sec. 2681), and judgment having been rendered after the lapse of the time limited, in default of an answer: *Held*, that the question on appeal is, whether the demurrer was *well taken*; and where the demurrer is in effect a *general* one, the question is, whether the complaint states a good cause of action. *Diggle v. Boulden*, 477
3. Objections to the taxation of costs in the court below, not made to that court, cannot be considered here. *Ibid.*
4. Where the cause was submitted to a jury, and all the issues determined by it, without objection, it is too late to object, upon appeal, that upon the case made by the pleadings the court should have adjudged an *accounting*. *McCormick v. Ketchum*, 643
5. Where the bill of exceptions is not stated therein to contain all the evidence, this court must presume that every fact necessary to support the verdict and judgment was duly proven. *Ibid.*
6. A casual remark made by the judge in ruling upon the admissibility of evidence, and not objected to at the time, cannot be reviewed as a part of the charge to the jury. *Ibid.*

(B.) *From Commissioners to Circuit Court.*

Plaintiff presented to the commissioners appointed to adjust demands against an estate, a claim for money loaned to the decedent, and also one for labor done for him; and the commissioners allowed a certain sum for money so loaned, but wholly disallowed the claim for labor; and thereupon the administrator of the estate appealed from the former allowance, but plaintiff did not appeal from the disallowance of his claim for labor. *Held*, that the only question which the circuit court could adjudicate was the amount due plaintiff as for money loaned; although

testimony as to both claims was taken before a referee, without objection.
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APPEALABLE ORDER. See STAY OF PROCEEDINGS.

ASSIGNMENT.

See BILLS AND NOTES, 1. FORECLOSURE OF MORTGAGE, 6. LIEN, (C.)

1. An assignment of note and mortgage purported to be in consideration of a specified sum paid the assignor by three persons named, who in fact constituted the firm of W. & P., and it assigned the instruments to "the said W. & P.," for their use and benefit, with condition that if the assignor should pay to W. & P. a specified sum by a day named, the assignment should be void. The indebtedness thus secured was one to the firm of W. & P. *Held*, that the assignment was to the firm, and not to its individual members. *Potter v. Stransky,* 235
2. The fact that the statute of limitations has run upon the note to secure which another note and mortgage were assigned, as well as upon the note originally secured by the mortgage, will not prevent the assignee from foreclosing the mortgage. *Ibid.*
3. To render a prior assignment of a mortgage void as against one claiming under a subsequent one, on the ground that the former was not recorded, such claimant must show a recorded chain of title to himself from the common source of title, and that the instruments recorded in fact were *entitled* to record. *Ibid.*
4. An assignment of a mortgage with only one attesting witness is not entitled to record. *Ibid.*
5. After an assignment of a note and mortgage as collateral security for a debt, the mortgagee died without having paid such debt, and the administrator had not possession of the securities, and did not claim them as assets of the estate, and did not know of their existence until informed thereof by one C., to whom he assigned them for the sum expressed in the instrument, of ten dollars. C. assigned the note and mortgage to S., who paid only \$225 for them, though the mortgage debt was then over \$1,600, and was seventeen years overdue, and the instruments were not in C.'s hands. *Held*, that S. was not a purchaser in good faith. *Ibid.*

ATTACHMENT.

(A.) *Of Goods.* See EXEMPTION, 1.

1. Under secs. 29-32, pp. 1475-6, Tay. Stats., no trial of the traverse to an affidavit for attachment could be had after judgment in the action, standing unreversed. *Bassett v. Hughes,* 23
- [2. Under sec. 2745, R. S. (which, however, did not govern this case), the issue upon such a traverse, if made before trial of the action, cannot be tried after judgment.] *Ibid.*
3. Whether a county of this state is liable for damages, where the district attorney has attached property maliciously and without probable cause, in behalf of the county, *quære.* *Board of Supervisors v. Stahl, imp.,* 593

4. For damages resulting from an attachment (against property) merely wrongful, without averment of malice or want of probable cause, the remedy in case of a discontinuance of the attachment suit was that prescribed by secs. 32, 34, p. 1476, Tay. Stats.; and not by an independent action, nor by counterclaim in a subsequent action by the county against the attachment debtor. *Ibid.*
5. Whether, where the court immediately adjourned after the discontinuance of an attachment suit, in the absence of defendant's attorney, it could still enable defendant to have his damages assessed in the attachment suit under the statutory provisions above cited, is not here determined; but he has, at least, no other remedy. *Ibid.*
6. According to the general tendency of modern decisions, one who does an act under a lawful authority will not be rendered a trespasser *ab initio* by subsequent irregularities, except where he does or consents to some positive act which goes to show that the original lawful act was done with an unlawful purpose. *Grafton v. Carmichael*, 660
7. Accordingly, the plaintiff, in an attachment suit in justice's court, may justify a taking of defendant's goods under a valid attachment, although the subsequent judgment against the attachment defendant, and sale of the goods on execution, are invalid by reason of a subsequent failure of the justice to cause notice to such defendant to be posted, etc., as required by law where personal service of the writ is not made; and this though such attachment plaintiff received a portion of the money made on the execution. *Ibid.*

(B.) *Of Witness, for Contempt.* See CONTEMPT.

ATTORNEY-AT-LAW.

See ATTACHMENT (A.), 3.

The previous lack of statutory authority for the admission of women to the bar in this state having been supplied by act of the legislature (subd. 5, sec. 2586, R. S.), this court admits to its bar the female applicant in this case, without considering the question whether, under the constitution of this state, the power to prescribe the rule of admission to the bar is in the legislature or in the court. *Application of Miss Goodell*, 693

BAR OF SUPREME COURT. See ATTORNEY-AT-LAW.

BASTARDY ACT.

1. In a proceeding under the bastardy act, where defendant had continued the cause over one term of the circuit court, and, though he knew that a certain witness might be material, had taken no steps to summon him until a few days before that fixed for the trial, when the witness had left the state to avoid being summoned: *Held*, that there was no error in refusing a further continuance on account of the absence of such witness; especially where, if present, he could not have been compelled to testify to the facts which defendant expected to prove by him. *Dingman v. The State*, 485

2. There is no error in refusing defendant a new trial in such a case, on the ground of newly discovered evidence, where he had been informed three weeks before the trial that the witness from whom such evidence is expected, might be a material witness for him, and neither procured his attendance nor asked a continuance to enable him to procure it. *Ibid.*
3. The evidence in this case, as to the paternity of the child, being of a conflicting character, and the questions of fact fairly disputable, and the charge of the court having presented the case on plaintiff's part in a forcible *argumentative* way, without so stating it on defendant's part, and having been expressed in terms from which the jury must have inferred the judge's opinion to be that they should find against the defendant, the judgment against him is reversed, without considering whether a *preponderance* of evidence against the defendant in such a case is sufficient. *Ibid.*

BILL OF EXCEPTIONS.

See APPEAL (A.), 5.

When the judge of the court below settles and signs a bill of exceptions upon an appeal, he thereby determines the regularity of the proceedings preliminary thereto; and such determination cannot be reviewed upon that appeal; but the remedy is by motion to strike the bill from the files. *Oliver v. Town*, 24 Wis., 512; *Sexton v. Willard*, 27 id., 465. *Bergenthal v. Fiebrantz*, 435

BILLS AND NOTES.

See EVIDENCE, 1. JUDGMENT (H.)

1. The payee of a note delivered it as collateral security, with his written assignment to the pledgee indorsed thereon, and the pledgee afterwards gave temporary possession of the note for a specific purpose to the payee, who thereupon converted it to his own use, by selling it to one W., to whom the makers paid the note, and took it up. In an action by the pledgee against the makers, *Held*,
 - (1.) That, defendants refusing to produce the note, on notice, it must be presumed that when they took it up the assignment indorsed remained unerased and uncanceled.
 - (2.) That from the note itself, in that condition, both W. and defendants were chargeable with notice of plaintiff's rights as assignee; mere possession of the note in that state by the payee did not raise any legal presumption of a reassignment to him; the inability of W. to read, or his having in fact overlooked the assignment, would not prevent his being chargeable with notice thereof; the delivery of the note to the payee under such circumstances would not estop the assignee from asserting his ownership; and, in the absence of further evidence, it was error to direct a verdict for the defendants. *Pier v. Bullis et al.*, 429
2. One who appears upon the face of a note to have signed it as a joint maker, may show by parol that the creditor knew, when the note was executed, that he was merely a surety, and has since, without his consent, extended time of payment to the principal. *Irvine v. Adams, imp.*, 468

3. Successive agreements by the payee of a note to extend time of payment to the principal for a usurious consideration, with successive payments, *after the expiration* of each time of extension, of the usury stipulated therefor, do not release the surety; there being no suspension of the payee's right to enforce payment of the note. *Ibid.*
4. Where, upon the principal maker of a note compromising with a part of his creditors, including the surety, the latter treats the amount of the note as an existing obligation of the principal to him, he is estopped to deny his liability to the payee thereon, though the latter was not a party to the compromise. *Ibid.*
5. An alteration of a note after execution, not made with fraudulent intent, by the person claiming under it, or with his consent, will not invalidate the instrument. *Gorden v. Robertson et al.*, 493
6. The effect of a fraudulent alteration upon the payee's right to maintain an action upon the original indebtedness for which the note was given, not here considered. *Ibid.*

BONA FIDES. See ASSIGNMENT, 5.

BOND.

1. *Official Bond*. See EVIDENCE, 11. SURETYSHIP, 1.
2. *Administrator's Bond*. See ADMINISTRATORS, etc., 5.
3. *Other Bonds*. See SURETYSHIP, 2, 3.

BOUNDARIES.

Where only section and quarter-section corner posts were established by the original government survey of a quarter section bordering on the north line of a town, the sixteenth corner posts must be determined, upon a resurvey, in the manner prescribed by the statute (sec. 4, ch. 323 of 1860; sec. 5, ch. 120 of 1862; R. S., sec. 770). *Jones v. Kimble*, 19 Wis., 430. *Westphal v. Schultz*, 75

BURGLARY. See CRIMINAL LAW, etc., 16.

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CASES DISTINGUISHED, CRITICISED, Etc.

1. *In re the motion to admit Miss Lavinia Goodell to the Bar of this Court*, 39 Wis., 232, distinguished by reference to a change in the statutes touching admission to the bar. *Application of Miss Goodell*, 693
2. *Johann v. Rufener*, 32 Wis., 95, and *Pierce v. Railway Co.*, 36 id., 283 (as to the duty of a garnishee in protecting the interests of the principal debtor), distinguished. *Bushnell & Clark v. Joseph Allen & Bro.*, 460, 467
3. *Kollock v. Stevens Point*, 37 Wis., 348 (as to presumptions in favor of judgment where the bill of exceptions does not contain all the evidence), distinguished. *Edwards v. Smith*, 254, 256
4. *Milwaukee & St. Paul Railway Co. v. Board of Supervisors, etc.*, 23 Wis., 116 (as to exemption of railroad hotel from local taxation), distinguished. *C., M. & St. P. Railway Co. v. Board of Supervisors, etc.*, 667, 674
5. *Pierce v. Railway Co.*, 36 Wis., 283. See No. 2.
6. *Stuart v. Allen*, 45 Wis., 158. A remark in the opinion as to the power of a court commissioner to punish a recusant witness for contempt, withdrawn. *State ex rel. Lanning et al. v. Lonsdale*, 348, 364-5

CERTIORARI.

1. To a common-law *certiorari* from the circuit court, a justice of the peace made return of two distinct docket records of the case, both signed by his predecessor (who rendered the judgment) and properly certified; one of which was full in its entries to show jurisdiction. *Held*, that, in

the absence of anything in the return to prove the contrary, it must be presumed that both records were kept at the same time; and an affidavit subsequently filed in the circuit court to show that the fuller record was not made at the time nor by the justice, could not be considered. *Healy v. Kneeland et al.*, 497

2. The question on such a *certiorari* being merely of the justice's *jurisdiction*, the judgment of the circuit court should simply affirm or reverse that of the justice. *Ibid.*

CHANGE OF VENUE.

An application to change the place of trial of a foreclosure suit, for prejudice of the judge, *held* to have been properly denied, where made in behalf of one only of several defendants. *Lery v. Martin*, 193

CHARGE TO JURY. See APPEAL (A.), 6.

CHARTER.

1. *Of City or Village.* See TAXATION.
2. *Of Private Corporation.* See FRANCHISE.

CHATTEL MORTGAGE.

See INFANCY. RECORDING OR REGISTRY ACTS.

1. A chattel mortgage which described the mortgaged property as "the entire stock in trade and fixtures" of the mortgagee, "consisting of clocks, watches, chains, show cases, jewelry, and all goods included in his stock, tools and material, excepting one safe, one regulator . . . and stock in trade to the amount of two hundred dollars" — *held* void for uncertainty. *Fowler et al. v. Hunt*, 345
2. A mortgage of cattle is not invalid because it describes them incorrectly as to their age, where it clearly appears from the evidence what cattle were intended; and especially will it be so held where the party claiming in opposition to the mortgage was not misled by the erroneous description, and could not have been so misled, in the exercise of ordinary care. *Harris v. Kennedy et al.*, 500

CITIES.

See HIGHWAYS. TAXATION.

1. A city is not liable in tort for the act of its treasurer, acting in good faith in the execution of his tax warrant, in seizing and selling the chattels of one person for the delinquent taxes of another. *Wallace v. Menasha*, 79
2. Whether an action will lie against the city, as for money had and received, to recover the proceeds of the sale of such property, paid into the treasury, or any part thereof, not considered. *Ibid.*
3. Under the defendant's charter, its board of aldermen have power to *appoint* night-watchmen, and to fix their compensation; and where

the resolution appointing such a watchman for a year fixed his salary for that year, he cannot recover a larger sum on the ground that he did not know that such resolution reduced the compensation below the sum for which he had served the previous year. *Doolan v. City of Manitowoc*, 312

4. Even if the employment of such watchman were not an appointment to public office, he would, on accepting the position, be bound by the terms of the resolution, entered upon the minutes of the board, directing his employment at a certain salary, in the absence of any proof of a subsequent modification of the contract; and payment for two quarters of the year at a higher rate, made by the city treasurer without the order or even knowledge of the board of aldermen, is no evidence of such a modification. *Ibid.*

COMMERCIAL AGENCY. See LIBEL, etc.

COMPLAINT. See PARTNERSHIP. PLEADING. PRACTICE, 5.

COMPROMISE of disputed claim. See AGENCY. CONTRACTS, 1, 2.

CONDEMNATION OF LAND. See EMINENT DOMAIN.

CONSTITUTIONAL LAW. See ATTORNEY-AT-LAW. CRIMINAL LAW, etc., 15.
EMINENT DOMAIN, 1-3. RAILROADS, 2. TAX PROCEEDINGS, 9, 12.

CONTEMPT.

- [1. *It seems* that the mere fact that a court commissioner, taking testimony in a case pending in court, had power to punish for contempt in respect to such examination, would not deprive the court of jurisdiction to punish for such contempt on the commissioner's report thereof.] *State ex rel. Lanning et al. v. Lonsdale*, 348
2. Sec. 4066, R. S., relating to the attachment of witnesses refusing to testify, etc., notwithstanding some general language therein, does not include the case of persons subpoenaed to depose in *judicial* proceedings pending in the courts, but relates exclusively to witnesses before municipal boards, or committees thereof, and other like bodies authorized to take testimony in other cases. A statement in *Stuart v. Allen*, 45 Wis., 158, *sub fine*, withdrawn. *Ibid.*
3. Under sec. 3477, R. S. (as well as at the common law), the circuit court of any county may punish as for a criminal contempt persons subpoenaed to testify in actions pending in such court, before a court commissioner in *another county*, where such persons disobey the summons or refuse to be sworn or to answer. *Ibid.*
- [4. While the power to punish for contempt was not conferred in the first instance by statute, but is inherent in the court, yet, when a statute prescribes the procedure in a prosecution for contempt, or limits the penalty, the statute controls.] *Ibid.*

5. The power of the court in any case to award *indemnity* to an injured party, in a summary proceeding as for a contempt, rests entirely upon the statute. *Ibid.*
6. The "loss or injury" for which the court may award compensation to the injured party in a proceeding as for a contempt, under secs. 3490-91, R. S. 1878 (secs. 21, 23, ch. 149, R. S. 1858), is a pecuniary loss or injury for which the party injured might recover damages by an action. *In re Ida Louise Pierce*, 44 Wis., 411, as to this point, adhered to. *Ibid.*
7. While sec. 4063, R. S., gives or recognizes a right of action by the aggrieved party against one duly subpoenaed and under obligation to attend as a witness, who fails to attend without reasonable excuse, to recover damages caused by such failure, no such action will lie against a witness for a mere refusal to answer proper questions, at least without allegation and proof of some special loss or injury. *Ibid.*
8. Where a witness is prosecuted and punished as for a criminal contempt, the relator in the proceeding cannot recover the expenses of the prosecution, in an action against him. *Ibid.*
9. An order of the circuit court adjudged that defendant was in contempt for his refusal to answer proper questions upon his examination as a witness before a court commissioner, in an action pending in said court, and that such refusal was calculated to and did impede and prejudice the plaintiffs in said action in their rights and remedies therein, and that such plaintiffs had been put to a large amount of costs and expenses in such proceedings, to wit, a specified sum; and it thereupon adjudged that, instead of a fine, defendant pay plaintiffs said sum, and that he be committed to jail, and there remain charged with such contempt, until he should answer such questions and *pay said sum of money*, etc. *Held*, that the court had no authority to adjudge payment of *indemnity* to the plaintiffs in such a case, instead of imposing a fine. *Ibid.*
10. When a witness refuses to answer a question on the ground that his answer might show him guilty of a misdemeanor and subject him to a penalty, the court must determine, under all the circumstances of the case, whether such is the tendency of the question, and whether the witness shall be required to answer. *Ibid.*
11. The regular course of proceeding where an officer, taking the deposition of a witness to be used in an action pending in a court of record of this state, reports to such court that the witness has refused to answer interrogatories propounded to him — stated. *Ibid.*

CONTINUANCE. See BASTARDY ACT, 1.

CONTRACTS.

See ASSIGNMENT. BILLS AND NOTES. CHATTEL MORTGAGE. CITIES, 2-4. DEED. EQUITY, 1, 10, 13, 14. HOMESTEAD, 2. INFANCY. INSURANCE, etc. JUDGMENT (H.), 2. LANDLORD AND TENANT. LIEN. RECORDING AND REGISTRY ACTS. SALE OF CHATTELS. SURETSHIP. TOWNS. VENDOR AND PURCHASER.

1. T., a creditor of M. & K., having a doubtful claim to subject to the payment of the indebtedness due him certain insurance moneys also claimed by

- K., knowing that K. had assigned his right to such insurance moneys to B., agreed with B., in consideration of \$200 paid him by the latter for sums which T. claimed to have advanced for premiums on the policies, to relinquish all claims against the insurance company for such moneys, and thereupon consented to the payment thereof by the company to B. In the absence of any evidence that such agreement was procured by fraud or imposition: *Held*, that T. cannot, in his action against M. and K., recover from B., as garnishee, any part of the moneys so paid to him, on the ground that the assignment to him was void as against his assignor's creditors. *Turner v. Burnell, Garnishee*, 221
2. Where A. claims in good faith to have a valid mortgage of chattels, which B. has purchased since the date of the mortgage, and thereupon the parties agree, by way of compromise, that B. shall pay, and A. receive in full satisfaction of his lien upon the chattels, a sum less than that supposed to be secured by the mortgage, this is a valid contract. *Harris v. Kennedy et al.*, 500
 3. Payment by defendant to plaintiff for board of the employees in question, for two months subsequent to the alleged contract made by H. in its behalf, if such payment was made with knowledge of the contract on defendant's part, would be evidence of a ratification. *Hall v. C., M. & St. P. Railway Co.*, 317
 4. A person employed to keep the account books of another may recover the balance due for his services upon other proof thereof, although the books were so negligently and unskillfully kept as not to show the state of the accounts between the parties. *McCormick v. Ketchum*, 643
 5. The fact that plaintiff was negligent and unskillful in his employment will not prevent his recovering what his services were really worth. *Ibid.*

CONVEYANCE. See ASSIGNMENT. DEED. HOMESTEAD. REFORMATION OF WRITTEN INSTRUMENT.

CORPORATIONS.

1. *Municipal Corporations.*
See CITIES. HIGHWAYS. TAXATION. TOWNS.
2. *Private Corporations.*
See FRANCHISE. INSURANCE, etc., 13. RAILROADS, 3.

COSTS.

See APPEAL (A.), 3. NEW TRIAL, 3. PRACTICE, 3.

1. Plaintiff appealed from the whole judgment, although a part thereof was in his favor; and, on affirming the judgment as to that part and reversing it as to the remainder, it not appearing that defendant was injured by the form of the appeal, this court, in the exercise of its discretion (R. S., sec. 2949), awards costs to the appellant. *Sherry v. Schraage*, 93
2. Where no direction is given to the clerk of this court *when a case is decided*, in respect to the taxation for printing cases and briefs, he will tax for

such disbursements according to the rules on the subject of taxation, without undertaking to determine whether the cases and briefs conform to the rules of this court in respect to such papers; and a taxation so made in this case, is affirmed. *Fairbank et al. v. Newton*, 384

3. Where, on *certiorari* to a justice's court, the circuit court not only affirmed the justice's judgment, but awarded to the defendant in error a judgment for the amount recovered by him before the justice, this court, on appeal, affirming in part and reversing in part, denies costs here to either party, but requires the respondent to pay the clerk's costs. *Healy v. Kneeland et al.*, 497

COUNTERCLAIM. See SALE OF CHATTELS, 5.

COUNTY. See ATTACHMENT, 3.

COURT AND JURY.

See BASTARDY ACT, 3. CRIMINAL LAW, etc., 5. HIGHWAYS, 2. VERDICT, 4.

1. Where the evidence is conflicting and would support a verdict either way, it is error to instruct the jury to return a verdict for the plaintiff. *Benham v. Purdy*, 99
2. The credit of a witness may be impeached by showing that he has made statements out of court contrary to his testimony at the trial; and where the testimony was so conflicting as to make the credibility of the witnesses important, and such impeaching evidence as to respondent's witnesses had been introduced by the appellant, it was error to instruct the jury that such evidence "is generally worthless to destroy the evidence of witnesses to facts." *Warder et al. v. Fisher*, 338

COURT COMMISSIONER. See CONTEMPT, 1, 2, 11.

CRIMINAL LAW AND PRACTICE.

1. Where, on trial of an information for murder, acts and conversations between the accused and the deceased, which occurred a short time before the death, were admitted in evidence on behalf of the state, and were both material as tending to show the state of mind of the accused toward the deceased, it was error to reject evidence for the defense as to the same conversations; and, the accused being, by the law of this state, a competent witness in her own behalf, it was error to reject *her* testimony as to such conversations; and the fact that there was *other* testimony by and for the accused to the point that after such acts and conversations the parties had been reconciled and their relations were apparently pleasant, does not relieve the error. *Mack v. The State*, 271
2. When the acts of a party are admissible in evidence, what was *said* at the time of doing the acts, being a part of the transaction, explaining and characterizing it, and deriving credit from it, is also admissible as part of the *res gestæ*; and under the circumstances of this case (for which see the opinion), after the state had properly put in evidence the *acts* of the

parties a short time before the death, the defense would have been entitled to show the conversation between them occurring at the same time, even if the state had not introduced evidence of such conversation. *Ibid.*

3. The state introduced evidence to show (as a motive for the murder) that the accused, being the wife of the deceased, had a criminal intimacy with one X, who was in the employ of the deceased; and such evidence tended to show that X had been discharged by the deceased, and, after being reemployed, had again been discharged by him after one day's service. *Held*, that it was error to reject evidence for the defense to show why X left such employment, offered to repel the inferences unfavorable to the accused sought to be derived from the state's evidence. *Ibid.*
4. There was no error in permitting the state to put in evidence the testimony of the accused, given at the coroner's inquest, before the arrest. *Ibid.*
5. The *credibility* of a witness is a question for the jury, under proper instructions and cautions from the court, notwithstanding he may have made contradictory statements under oath, or be an accomplice of the accused. *Ibid.*
6. Upon an information charging the accused, in separate counts, with murder, and with being an accessory thereto, there was no error in admitting in evidence against him testimony given by him as a witness for the state, while under arrest upon suspicion of having committed said crimes, upon the examination of another person accused of the same murder; there being no reason for believing that such testimony was not entirely voluntary. *Dickerson v. The State*, 238
7. The court instructed the jury as follows, in reference to the accused: "By his testimony he charges the murder upon the wife of the victim. In so doing, has he kept back and concealed what would, if divulged, implicate himself in the commission of the deed, or show that he aided and assisted the woman in its commission? Has he told the whole truth in respect to the death of N.? Has he satisfied you that the woman, alone and unaided, perpetrated the crime? If you are satisfied that he has not told the whole truth in respect to the death of N., that he has kept back and concealed important facts and circumstances connected with such death; if, from the nature of things, you are satisfied, from the testimony that you regard as reliable, that something must have been done in taking the life of N., other than what he has stated: what does such testimony justify you in believing as has been suppressed by the defendant? And does what has been suppressed implicate him as aiding and assisting in the commission of the deed, and how? These and like questions are important for your consideration in determining whether the defendant be or be not guilty." *Held*, not liable to the objection that it left the jury to find defendant guilty upon *conjecture*, or otherwise than upon the evidence. *Ibid.*
8. An instruction that the jury should find the accused "guilty of murder in the first degree, or not guilty, according as they should find the fact," even if understood as requiring them to acquit him entirely in case they should not find him guilty of murder in the first degree, *held* to contain no error *injurious to the defendant*. *Ibid.*
9. This court is of opinion that there was no error in refusing to grant a new trial on the ground that the verdict against the accused was contrary to the evidence. *Ibid.*

10. In a criminal action, it is competent for the accused to show that at or about the time when the crime was committed, he was in such a physical condition as to render it improbable that he committed it; and the fact that such condition was caused by intoxication makes no difference in the rule, the intoxication not being set up as a defense. *Ingalls v. The State*, 647
11. In a criminal action, it is in general within the discretion of the court below whether to instruct the jury not to find defendant guilty upon the unsupported testimony of an accomplice; and where that court refuses a new trial after a verdict founded upon such testimony alone, this court will not reverse the judgment upon that ground. *Ibid.*
12. A refusal to instruct the jury, in a criminal action, that "if a witness knowingly and deliberately swear falsely in regard to one material fact, the jury are not bound to believe any of his statements unless corroborated by other proof," is held no error, where there was no evidence showing that any witness in the case had thus sworn. *Ibid.*
13. It seems that, independently of sec. 4073, R. S., the defendant in a criminal action could not be required, as a witness, to testify whether he had ever been convicted of an infamous crime not charged in the information for the purpose of subjecting him to punishment as for a second offense; that the right of the witness in any case to decline answering such a question on the ground that the answer would tend to degrade him, was personal to such witness, and could not be taken by the party calling him; but that the objection that such testimony is not the best evidence of the fact might be taken, specifically, by such party. No opinion is here expressed as to the construction of said sec. 4073. *Ibid.*
14. Mere possession of stolen goods, by the accused, shortly after the larceny, does not raise any legal presumption of his guilt, but is merely a circumstance to be considered by the jury in connection with the other facts in the case. *Ibid.*
15. Statutes imposing a greater penalty for a second or third offense of the same character than that imposed for the first offense, do not violate the constitutional provision which forbids putting one twice in jeopardy for the same offense. *Ibid.*
16. In charging an offense under sec. 4410, R. S., where it is alleged that the intent of the breaking and entry was to commit a larceny, it is not necessary to allege the value of the goods which the accused intended to steal. *Hall v. The State*, 688

DAMAGES.

See ABATEMENT, 1, 2. EMINENT DOMAIN, 5, 6. JUDGMENT (I.), 2, 3, 5. NEW TRIAL, 1. RAILROADS, 1, 2.

In an action for injuries to plaintiff's wife, causing loss of her services, etc., the evidence was that the wife had been an invalid for two years before the injury complained of, but that during that period she had been gradually recovering her health, and that prior to such injury the indications were that she would soon recover. Held, that there was no error in refusing to submit for a special verdict the question, what was the value of her services per month during those two years. *Meese v. City of Fond du Lac*, 323

DE BONIS ASPORTATIS. See ATTACHMENT, 6, 7. CITIES, 1. PLEADING, 3.

DEED.

See ASSIGNMENT, 4. CHATTEL MORTGAGE. EQUITY, 1, 10-15, 18. HOME-STEAD. INFANCY. REAL PROPERTY. RECORDING OR REGISTRY ACTS. TAX PROCEEDINGS, etc., 1-5.

1. The original owners of lots on a navigable stream (whose lots on each side extended, by the law of this state, to the thread of the stream), built, under a grant of franchises from the state, a dam for hydraulic purposes across said stream, abutting at each end upon their lots, and sold and leased the right to use the water from the dam; and the grantees of such rights, their heirs and assigns, covenanted to contribute to the maintenance of the dam in proportion to the amount of water so purchased, and took the right to maintain such dam forever; but the deed conveyed no other interest in said abutting lots. Afterwards such original owners conveyed to another person the lot upon which the dam abutted at one end, by a general description according to its number, for a price very greatly disproportioned to that at which the dam and water-power were valued; and thereafter, with the knowledge and acquiescence of the grantee of such lot, continued to sell and lease rights to use the water from the dam. *Held*, upon this evidence, that there was a severance of the ownership of the lands upon the bank and those under the stream, and that the deed of such abutting lot was designed to convey, and did convey, only the land upon the bank. *Smith v. Ford*, 115
2. When the owner of the land laid out into blocks and lots bounded by what are represented, on an unrecorded or defective plat, as streets, conveys a lot, referring in the deed to the plat as containing the true description of the premises, his grantee takes, as against the grantor and his assigns, to the center of the street upon which the lot abuts. So *held* in a case where the deed referred to the plat as "on record," and it was in fact recorded, though not entitled to record. *Jarstadt v. Morgan*, 245
3. A deed of conveyance from parents to daughter, after the usual granting and *habendum* clauses, declares that the "conveyance is not to become absolute until the decease" of both grantors, and then only on this condition, that the grantee, her heirs, etc., shall cultivate the land in a good and farmer-like manner, and shall deliver to the grantors, or either of them, annually, during their or either of their natural lives, one-third of the annual product thereof. The consideration expressed in the deed is one dollar, and the "reservations and rents hereby reserved." *Held*, that the conditions named are conditions subsequent. *Drew, Adm'r, v. Baldwin et al.*, 529

DEMURRER. See APPEAL (A.), 2. PRACTICE, 5, 6.

DEPOSITION.

A failure to serve on a party notice of the taking of a deposition is waived by his joining in the commission and submitting cross interrogatories. *Benham v. Purdy*, 99

DISMISSAL OF ACTION. See PRACTICE, 1-3.

DISTRICT ATTORNEY. See ATTACHMENT, 3.

EJECTMENT. See BOUNDARIES. RES ADJUDICATA.

EMINENT DOMAIN.

See RAILROADS, 2.

1. Under the act of congress of March 3, 1875, and sec. 2, ch. 291 of the general laws of Wisconsin for 1874, compensation may be recovered for lands flowed by the Fox and Wisconsin River Improvement; and the amount of such compensation may be ascertained by proceedings in the courts of this state as provided by ch. 119 of the laws of this state of 1872, in respect to lands taken by railroad companies. *Jones, Adm'r, et al. v. The United States*, 335
2. The fact that in the judicial proceedings in the state courts in such cases the United States is the nominal defendant, does not render the state act invalid; because the act of congress authorizes the compensation to be ascertained "in the mode provided by the laws of the state;" the whole proceeding is in fact one by which the general government enforces its condemnation of the land; and that government has the right to sue in the local courts, and is suable there *with its own consent. Ibid.*
3. The act of congress in question is not liable to the objection that it attempts to delegate to the state tribunals the power of the general government to condemn land. *Ibid.*
4. The act of congress authorizes the ascertainment of damages in the manner above indicated, in case of lands flowed either *before* or after the passage of the act by works *previously* or subsequently constructed, where compensation for such flowage *was then* or should thereafter become legally owing, if, "in the opinion of the officer in charge, it is not prudent that the dam or dams be lowered." *Held*, that this contemplates not a mere *expression of opinion* by the officer in charge, but such final and conclusive action of the United States, by such officer, as would constitute a legal release of all present and future right to maintain the dam as previously maintained; and even such relinquishment will not prevent a recovery for *past* damages. *Ibid.*
5. The damages in such cases should include all past damages to the land, caused by the improvement, within the period of statutory limitation. *Ibid.*
6. In an action for flowage of land by a dam, the fact that another dam contributes to some extent to produce the flowage complained of, is no defense. *Arimond v. G. B. & M. Canal Co.*, 35 Wis., 51; *Pumpelly v. The G. B. Company*, 13 Wall., 166. *Ibid.*

EQUITY.

See FORECLOSURE OF MORTGAGE. TAX PROCEEDINGS, 12.

1. By a deed of trust (purporting to be made in pursuance of an ante-nuptial contract therein recited), A. and his wife, B., assigned and conveyed to

X. all the personal and real estate which B. had at the time of her marriage or at the date of the deed, etc., in trust, as to the personality, to invest the same at his discretion, receive the income thereof during the joint lives of A. and B., and pay the same to B. and her assignees, with power in B., by an instrument in writing, etc., to direct X. to dispose of such personal property according to her appointment, etc., etc.; and in trust as to the realty, to hold it and pay the rents, issues and profits to B. during the joint lives of A. and B., or to such persons as she might appoint, and to convey any part of said realty to such person as she should appoint, etc. If B. should survive A., the trustee was to convey, assign and transfer all the property to her, in the absence of any other appointment by her; and if she should die before A., the trustee was to convey, assign and transfer all the property to such persons as she might have appointed by her last will, or, in default of such appointment, was to assign and transfer the personality to her next of kin, and convey the realty to her heirs-at-law. *Held*, that the trust thus created is an *active* one, and valid under subd. 5, sec. 2031, R. S.; but that the trustee took *no beneficial interest* thereby in the trust estate. *Smith v. Ford*, 115

2. A decree in equity does not ordinarily affect the rights and interests of persons not made parties, but binds those of the actual parties, so far as the court has jurisdiction; and its jurisdiction to bind such parties does not depend upon the presence before it of all persons who are proper parties to the suit. *Ibid.*
3. Thus, in a suit against A. and B., the grantor of the trust and the *cestui que trust* named in said trust deed, to have a mortgage by A. to X. in trust for B. (made after said deed of trust) adjudged fraudulent as against the plaintiffs in that suit, who were judgment creditors of A., and to subject the mortgaged lands to said plaintiffs' judgment against A. (the alleged fraud being that of A. and B., and not of X.), the non-joinder of X. as defendant did not disable the court to take jurisdiction; and its decree that the mortgage was in fraud of A.'s creditors, binds A. and B. and all persons claiming under them subsequently to that suit. *Ibid.*
4. A clause in such decree, reserving the rights of the trustee, *held* to protect only those rights in the property (if any) which he did not hold for the benefit of B. *Ibid.*
5. Where, pending such creditor's suit, the trustee brought, in another court, an action to foreclose said mortgage, and made said creditors defendants therein as persons claiming some interest in the premises, which interest was alleged to be subsequent and subject to the mortgage: *Held*, that he could not *compel* them to litigate in that action the question of the validity of such mortgage as against their judgment. *Ibid.*
- [6. Whether the question of the fraudulent character of a mortgage as against the mortgagor's creditors can *properly* be litigated in a foreclosure suit, and whether, where the creditors are made defendants only under the general allegations above described, a judgment against them will bar them from asserting, in a suit subsequently commenced, that their rights are paramount to those of the mortgagee, somewhat considered, but not determined here.] *Ibid.*
7. On the non-appearance of such creditors in the foreclosure suit, judgment of foreclosure went against them with other defendants; and the land was bid off by the trustee, X., at the foreclosure sale. A decree being

afterwards rendered in favor of the plaintiffs in said creditor's suit, the same lands were sold to F. on their judgment against A. *Held*, that F. acquired by such sale the whole interest of A. and B., and, if X. took the legal title by purchase at the foreclosure sale, he holds it in trust for F. *Ibid.*

8. If X., by the trust deed to him, had taken power to dispose of the property at his own discretion, one who, pending said creditor's suit, and after the foreclosure sale, took from him a deed of the lands in question, must at least have shown, as against F., that he took his conveyance in good faith, for value, without knowledge of the rights of A.'s creditors. *Ibid.*
9. In this case, however, X. having taken, by the terms of the trust deed, no power of disposition except at the direction of the *cestui que trust*, one purchasing from him pending the creditor's suit against A. and B. was bound to take notice of that suit, and could not acquire title under a foreclosure of the mortgage therein adjudged void. *Ibid.*
10. At the request of executors, plaintiff advanced moneys to pay a mortgage of lands of the estate, held by M. and past due, and also to pay accrued taxes on the lands; and he took as security for such advances a mortgage of the same lands made by the executors in pursuance of a license of the county court, which was, however, invalid. When his first mortgage was thus paid, M. owned subsequent mortgages of the same lands, executed by the testator's widow while she had a dower interest thereat; and he refused to assign the first mortgage to plaintiff, and discharged it of record. *Held*, that plaintiff, as security for his advances, is entitled to be subrogated to M.'s rights as mortgagee under such first mortgage; and this not only against the heirs, but also as against M.'s subsequent mortgages. *Levy v. Martin*, 198
11. A written instrument will not be reformed on the ground of alleged mistake, unless the party complaining moves promptly after discovery of the mistake; nor then without clear proof. *Sable v. Maloney*, 331
12. In this case a judgment reforming a deed is reversed for *laches* in failing to bring suit until nearly fifteen years after both parties to the deed had knowledge of the alleged mistake; and also for the insufficiency of the evidence — the testimony of the parties to the deed (who appear to be equally credible) being in direct conflict, and neither being corroborated. *Ibid.*
13. A written instrument will be reformed, for fraud or mistake, only so as to give effect to a previous binding contract of the parties; though it seems that this rule is not inconsistent with such reformation of an instrument where the executory agreement was oral and within the statute of frauds. *Petesck v. Hambach et al.*, 443
14. Where a mortgage of land of a married man, executed by him and his wife, and taken by the mortgagee as security for moneys loaned to the husband, with the understanding and belief of all parties that it was a mortgage of the homestead, was found to be of other lands only: *Held*, that the instrument cannot be reformed as against the wife, after the husband's death (where the homestead had descended or been devised to her); nor would it have been reformed even as against the husband in his lifetime, since, by the statute, it would have been void without the wife's signature. *Ibid.*

COLE and TAYLOR, JJ., dissented. RYAN, C. J., was absent.

15. It appearing from the evidence that plaintiff agreed to sell and convey lands to defendants subject to the rights of W. and S., to whom plaintiff had sold all the pine timber on said land on condition that they should remove it within a specified time (which has not expired), and that the insertion of a clause to that effect in plaintiff's warranty deed to defendant was omitted through mutual mistake and inadvertence, the deed should be so reformed as to show that the conveyance was subject to the rights of W. and S. under said contract; but it was error to reform it by inserting an absolute reservation to plaintiff of all the pine timber on the land at the date of the deed, without fixing any time within which it should be cut and removed by plaintiff or his assigns. *Sawyer v. Hanson*, 611
16. The complaint of an administratrix, for an accounting, alleges that defendant, as agent of plaintiff's intestate, received from the latter certain moneys to loan for him, and has not fully accounted therefor; and that plaintiff is not in possession of any books, papers or memoranda, by which the amount or the investment thereof can be ascertained. *Held*, that (notwithstanding the statute which supersedes the proceeding by bill in equity for a *discovery*, in aid of another action) the complaint states a good cause of action in equity. *Schwickerath, Adm'x, v. Lohen*, 599
17. After an answer in this action, accounting in part, and alleging a settlement, it was too late to object generally at the trial to the introduction of any evidence under the complaint, on the ground that the complaint did not state a cause of action within the equity jurisdiction of the court. *Ibid.*
18. In 1875, plaintiffs, a married couple, old and infirm, conveyed the homestead farm to their daughter C., on the sole consideration that she should support and maintain them during the remainder of their natural lives; and at the same time the daughter executed to her father an instrument called in the complaint a "lease of said lands to hold the same during his life-time" and that of his wife, with a covenant to support them during their lives in a comfortable manner, and a provision empowering them, or either of them, upon breach of such covenant, to take possession of the premises and hold them for their support and maintenance. A few months afterwards, the daughter died; since that time plaintiffs have supported themselves; all the children and heirs-at-law of C., except one, are non-residents of this state, and "do not desire to carry out" C.'s agreement with plaintiffs, and that one is not of sufficient ability to do so. *Held*, that equity, at plaintiffs' suit, will cancel the conveyance to C. *Bogie v. Bogie*, 41 Wis., 209, and *Bresnahan v. Bresnahan*, 46 id., 385. *Bishop et al. v. Aldrich et al., imp.*, 619
19. *It seems* that if, between the date of such conveyance and C.'s death, she expended for plaintiffs' support more than she received from them, the court may make her personal representative a party to the action, ascertain the amount, and require payment thereof as a condition of relief. *Ibid.*
20. A judgment of strict foreclosure of a land contract may provide that after the time thereby limited for payment, a writ of assistance shall issue if defendant refuse to surrender; that remedy being within the inherent power of chancery. *Diggle v. Boulden*, 477

ESTATES OF DECEDENTS. See ADMINISTRATORS, etc. APPEAL (B).

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ESTOPPEL.

See BILLS AND NOTES, 1 (2), 4. INSURANCE, etc., 7, 8.

In ejectment, lands conveyed to plaintiff (including that in dispute) being described in his deed by reference to corners and lines in a village therein named, he offered in evidence the *record* of the plat of said village (instead of the original plat), "for the purpose of proving the locality of the premises described in the complaint." *Held*, that he was thereby estopped to deny the *validity* of the record, and its legal effect as a dedication of streets. *Jarstadt v. Morgan*, 245

EVIDENCE.

See BASTARDY ACT, 3. BILLS AND NOTES, 1, 2. CERTIORARI. CITIES, 4. COURT AND JURY, 2. CRIMINAL LAW, etc., 1-4, 6, 10-14. DAMAGES, 1. DEPOSITION. FORECLOSURE OF MORTGAGE, 3. HIGHWAYS, 3. INSURANCE, etc., 3. RAILROADS, 6. TAX PROCEEDINGS, etc., 4, 5, 8-10. WILLS.

1. In an action for contribution by one of two joint indorsers against the other, where the issue is, whether defendant, as well as plaintiff, and through plaintiff as his agent, waived presentment and notice, evidence of a promise by defendant to plaintiff, after the maturity of the note, to pay his share of it, may be received as bearing upon that issue. *Meusel v. Semple*, 86
2. Where there was evidence tending to show that the defendant company had authorized one H. to make a certain contract with plaintiff for boarding some of its employees, or had subsequently ratified the contract so made, there was no error in rejecting evidence offered by defendant to show that it had not in other cases paid such bills except upon special conditions not included in such alleged contract. *Hall v. C., M. & St. P. Railway Co.*, 317
3. Where the question is, whether a partnership was dissolved before certain goods were seized on execution for a partnership debt, proof of statements made by one of the former partners, after such alleged dissolution, in the absence of the other partner, is inadmissible. *Fick v. Mulholland*, 413
4. In an action for an injury alleged to have been caused by defects in a highway over which plaintiff was driving, it was error to permit a witness, who had driven over the highway at the same spot on the same day, and frequently at other times, to answer the question, whether, if a person driving over that part of said road, on that day, had driven in a careful manner, "as you would ordinarily drive on ordinary roads," there would have been any danger of an accident in consequence of the condition of the road; such question calling upon the witness to determine the exact issues which the jury were to determine. *Mellor v. Town of Utica*, 457
5. In an action by a practicing physician for injuries from a defective highway of the defendant city, the amount of damages being in question, another physician of the same city, as a witness for the defense, was asked

whether he would have known of "any falling off of plaintiff's practice, if that had been the case;" what would have been, during the time since the alleged injuries, a fair amount of patronage *per diem* for an ordinary physician of fair standing, without any physical disability to attend calls; and "what a fair division of the patronage as it existed, on plaintiff's part, would amount to." *Held*, that there was no error in overruling the questions, as not properly calling for the opinion of the witness as an expert, and as tending to substitute his opinion for that of the jury upon a question directly in issue. *Wylie v. City of Wausau*, 506

6. Where the mortgagee of land in this state is a resident of another state, the record in the county where the land is situate, of an instrument purporting to be his last will, and of the probate thereof in such other state, is not proof either that the mortgagee is dead, or that the person named in such instrument as his executor had authority to act as such in foreclosing the mortgage by advertisement and sale: that not being the purpose or effect of sec. 2295, R. S. *Hayes v. Lienlokken*, 509
7. In actions for injuries from negligence, as in other civil actions, all issues of fact are to be determined by the jury upon the preponderance of evidence; and it is not necessary that defendant's negligence should be proven beyond a reasonable doubt. *Quaife et ux. v. C. & N. W. Railway Co.*, 513
8. In such an action, the injured person complained of pain and weakness in the hip joint, continuing from the time of the accident to that of the trial; and, *at the request of the defendant*, she submitted to an examination, during the trial, by a number of physicians and surgeons, one-half of them selected by herself and the others by the defense, who all testified that there was no appearance in the hip of physical conditions that would cause the pain complained of. One of those summoned by the plaintiff was then permitted, against objection, to testify that he thought he could tell whether or not she suffered pain from the movement of the hip, judging from all the examination, *including what she said*; and that she gave every indication of suffering pain; that in his opinion she did so suffer; and that the pain, if it existed, indicated some trouble in the hip joint. *Held*, that the evidence was properly admitted. *Ibid.*
9. Another of said surgeons, called by the plaintiffs, having testified that in the examination he had discovered nothing in the subject's physical condition which indicated that she was then suffering from the alleged injury, was asked whether there might not have been a fracture of the femur without his having been able to discover it; and he answered, in substance, that it was possible but not probable. *Held*, that it was within the discretion of the court to allow the question, though in the nature of a cross-examination of the party's own witness. *Ibid.*
10. The grantee's father afterwards sold another farm, on which he resided, and with his family went to live on the land so conveyed, with the grantee and her husband; but does not appear to have then claimed that there had been any forfeiture. A year afterwards the grantee and her husband left the land, but returned nine years later, and lived with the father on said land for more than a year, and then again left; and the father had control of the land from the time when they first left it until his death. *Held*, that these facts are at least not conclusive of an agreement by which the deceased became possessed of the land and seized as of his first estate; and that, in ejectment by his administrator against the grantee and her husband, it was competent for defendants

to show that while in possession he acknowledged their rights in the land, and did not claim it in his own right; and the grantee should have been allowed to testify, in her own behalf, for what reason she left the land. *Drew, Adm'r, v. Baldwin et al.*, 529

11. In an action upon the official bond of an overseer of highways, proof that he had not rendered to the town supervisors, "on or before the third Monday of March" in the proper year, a verified account in writing, of the character prescribed by sec. 60, ch. 19, Tay. Stats., would show a breach of the bond; but upon mere proof that he did not render such account on said third Monday, the *presumption* would still be that he had rendered it before that date. *Town of Sherwood Forest v. Benedict et al.*, 541
12. There is no *presumption* that, if the relator had compelled a delivery of the bonds before a certain act was passed incorporating a city which includes part of the territory of the defendant town, the legislature would have required such city to pay part of the bonded debt of the town—even if it had power to do so. *State ex rel. The G. B. & M. R. R. Co. v. Jennings et al.*, 549
13. In an action for tolls due upon logs run through plaintiff's dam, defendants having failed to produce, upon due notice, the scale book of the logs cut at their camp, there was no error in admitting secondary proof of the contents of such book (by testimony of the person who kept it), together with the evidence that all the logs so scaled were run through the dam. *Teuksbury v. Schulenberg et al.*, 577
14. Where defendant's agent, charged with cutting, hauling and getting out the logs, employed a person to keep another scale book, at the landing, and such book had been delivered to and retained by defendants, and they had made settlements for stumpage in accordance therewith: *Held*, that testimony of their said agent as to its contents was properly admitted. *Ibid.*
15. In an action wherein the plaintiff corporation was required to show a subscription to its stock by defendant, the facts having been shown that the stock book in which the subscriptions were made was not in the possession or under the control of the plaintiff, nor within the jurisdiction of the court, and that the person in possession thereof refused to deliver, exhibit or produce it upon plaintiff's demand, there was no error in permitting plaintiff to show by the testimony of its secretary, based upon his recollection, the contents of such book, relating to defendant's subscription. *Wisconsin River Lumber Co. v. Walker*, 614
16. The action being for the amount of an alleged assessment upon defendant's shares of stock, and the answer a general denial, and the record book of the meeting of the board of directors of the company, at which such assessment was made, being produced and identified by the secretary, his testimony as to what persons appeared by such record to have been present at the meeting, showing that all the directors were present, including the defendant, was *material* as well as competent. *Ibid.*
17. Defendant, as a witness in his own behalf, having denied making certain admissions to which one of plaintiff's witnesses had testified, and having been *cross-examined* by plaintiff on that subject, it was competent for plaintiff thereafter to introduce evidence to contradict the statements made by defendant upon such cross examination. *Ibid.*

18. In an action to recover a balance alleged to be due for services, after evidence introduced by defendant to show plaintiff's negligence and want of skill in his employment, it was competent for plaintiff, in rebuttal, to introduce testimony that he was competent or qualified for the employment, or that he was skillful, faithful and serviceable therein. *McCormick v. Kelchum*, 643

EXCEPTIONS. See VERDICT, 3.

EXCESSIVE DAMAGES. See JUDGMENT (I.), 2, 3, 5. NEW TRIAL, 1.

EXECUTION.

1. In an action against an officer who has seized chattels on an execution, by one who claims by previous purchase from the execution defendant, the officer must show the execution to be based on a *valid* judgment, before he can dispute the validity of the alleged purchase on the ground that it was fraudulent as against creditors. *Bean v. Loftus*, 371
2. Where the judgment record produced by such officer to sustain his defense shows that the court which rendered the execution judgment had never obtained jurisdiction of the defendant therein, a judgment against the officer must be affirmed here, although rendered on a different and erroneous ground, and although the bill of exceptions, made upon the appeal of such officer, does not bring up for review the exception taken to the admission of such evidence. *Ibid.*
3. The execution, after the venue, began: "To the sheriff or any constable of said county, greeting:" but in the body thereof the command to levy was given "in the name of the state of Wisconsin." *Held*, sufficient in form. *Ibid.*

EXECUTORS. See ADMINISTRATORS, etc.

EXEMPTION.

1. *From Seizure on Attachment, etc.*

Where plaintiff's goods seized, by an officer on attachment, were in fact exempt from seizure, and the jury found that after the seizure plaintiff demanded their return, and stated, as his reason for the demand, "that it was his property, and he wanted it to support his family:" *Held*, that this shows a claim of the property as *exempt*. *Fick v. Mulholland*, 413

2. *From Local Taxation.* See RAILROADS, 7, 8.

FEDERAL AND STATE COURTS. See EMINENT DOMAIN, 1-3.

FLOWAGE OF LAND. See EMINENT DOMAIN.

FORECLOSURE OF MORTGAGE.

See ASSIGNMENT, 2. EQUITY, 5-7.

1. Although, by the laws of this state, the mortgagor of land holds the legal title until the foreclosure sale, yet in a proper case, when necessary to protect the mortgagee's interests, equity will appoint a receiver; this may be done by order in the foreclosure suit, after judgment; and the fact that the complaint does not state facts authorizing the appointment, is no objection in such a case. *Schreiber v. Carey, imp.*, 208
2. Where the whole amount of the mortgage debt was not due, and the premises were ample security for the amount due, with costs, but the land could not advantageously be sold in parcels, and the whole mortgage debt would become due before there could be a sale under the judgment: *Held*, that the case should be treated as if the whole debt were due. *Ibid.*
3. The mortgage included the homestead; neither the interest nor any part of the principal had been paid; the debt was larger than the sum for which the premises could probably be sold; and there were other unsatisfied judgments against the mortgagor. *Held*, that, in the absence of rebutting proofs, the insolvency of the mortgagor was sufficiently established. *Ibid.*
4. Where the foregoing facts were shown, with the further fact that the mortgagor was willfully neglecting to pay the taxes on the land, there was no abuse of discretion in appointing a receiver. *Ibid.*
5. Whether the homestead should not have been excepted from the order, not here considered. *Ibid.*
6. A proceeding for a statutory foreclosure of a mortgage, by sale without action, void because made by a person without authority to act for or represent the mortgagee, cannot operate as an assignment of the mortgage. *Hayes v. Lienlokken*, 509
7. Judgment in foreclosure must conform to the statute then in force regulating the practice, or it will be reversed, at least where it does not clearly appear that the appellant will suffer no prejudice from the want of such conformity. *Welp v. Gunther et ux.*, 543
8. Under the existing statutes of this state, personal judgment against the mortgagor for the whole amount of the mortgage debt, or even for the deficiency after a sale of the mortgaged property, cannot be rendered with the judgment of foreclosure; though that judgment may include an order (if demanded in the complaint) that a judgment for the deficiency be entered after such deficiency shall have been duly ascertained; and this can be done only after the sale is made and confirmed; and a judgment in violation of this rule must be reversed. *Ibid.*
9. The statutory provision (sec. 3169, R. S.) that the purchaser at foreclosure sale shall be let into possession on production of the sheriff's deed, must be construed as defining the rights of such purchaser after confirmation of the sale. *Wehler v. Erdler*, 46 Wis., 301. *Ibid.*

FORECLOSURE OF LAND CONTRACT. See EQUITY, 20.

FOREIGN WILL. See EVIDENCE, 6.

FOX AND WISCONSIN RIVER IMPROVEMENT. See EMINENT DOMAIN.

FRANCHISE.

Plaintiff was authorized by statute to maintain certain dams, with a proviso that they should not raise the water above a certain height; was required to build and maintain suitable slides and flood-gates for specified purposes, keep them in repair, and also keep them open at certain times; and when he should have completed "said dams as aforesaid," was to have power to collect tolls on logs, etc., passing over the slides or driven by the aid of the dams, as a compensation for maintaining such dams; with a proviso that he was at all times to comply with the provisions as to slides and flood-gates. *Held*, that, upon showing that his dams were "in good repair" and "fit to run logs through," that the slides and gates were sufficient, and that defendants could not have run their logs through without the aid of such dams, he was entitled to recover the tolls, without further proof on his part of compliance with the statutes. *Tewksbury v. Schulenberg et al.*, 577

FRAUD. See BILLS AND NOTES, 5, 6. EXECUTION, 1.

FRAUDS, STATUTE OF. See LANDLORD AND TENANT.

FRIVOLOUS DEMURRER. See APPEAL (A.), 2.

GARNISHMENT.

See CONTRACTS, 1.

1. *It seems* that, under the R. S. of 1858, if a garnishee in justice's court failed to appear on the return day of the summons, the justice might afterwards compel his attendance, under sec. 119, ch. 120; or, after judgment against the attachment defendant, might render judgment against the defaulting garnishee for the amount thereof, under sec. 130; or that, before such judgment, the garnishee might appear and answer, under sec. 120. *Bushnell & Clark v. Joseph Allen & Bro.*, 460
2. The omission of the justice to make any entry in his docket in the garnishment proceeding, until after the principal judgment was entered, although there had been a previous *adjournment* in both actions, is not fatal to a judgment against the garnishee. So held in a suit against the garnishee (who had paid such judgment), by one who, between the service of the garnishee summons and the return thereof, had taken an assignment of the principal debtor's claim against such garnishee, and had notified him. *Ibid.*
3. Even where the summons in garnishment is not served on the principal debtor, as the statute now provides, the garnishee is only required to

make such defenses *to the merits* as he knows the principal debtor might make if present defending the garnishment proceedings, and not to make technical objections to defects in the record which may readily be cured by amendment. *Johann v. Rufener*, 32 Wis., 195, and *Pierce v. Railway Co.*, 36 id., 283, distinguished. *Ibid.*

4. Where copartners are garnished by their firm name, and the return shows service by reading it and delivering a copy to one of them, but does not show *which one*, and is indorsed upon the garnishee summons, instead of upon the summons in the principal action, these defects may be cured by amendment. *Ibid.*
5. Where, in such a case, the garnished firm appeared by one of its members and answered, and the principal debtor also appeared in the garnishment proceeding, the court acquired jurisdiction, and the failure of the garnishee to object to the defects in the return was no breach of duty to such debtor or his assignee. *Ibid.*
6. In garnishment under an attachment or summons, the fact that a judgment has been rendered against the principal debtor need not appear by the record in the garnishment proceeding; but the records in that and the principal suit are to be read together. *Ibid.*
7. Where the firm of "J. Allen & Bro." consisted of *Joseph* and *John Allen*, and, upon an affidavit that "John Allen & Bros." were indebted, etc., a summons in garnishment, addressed to "John Allen & Bro." was served upon one member of the firm, and the firm appeared and answered by one of its members: *Held*, that the misnomer of the garnishee in the affidavit and summons is of no importance; and an amendment in that respect was properly allowed. *Ibid.*

GRANTOR AND GRANTEE. See DEED. EVIDENCE, 10.

HABEAS CORPUS.

1. *It seems* that the provision of sec. 32, ch. 153, Tay. Stats. (sec. 3443, R. S.), that, if any person "shall knowingly recommit, imprison or restrain of his liberty, for the same cause," a person who has been discharged on *habeas corpus*, "or shall knowingly assist or aid therein," he "shall be liable to the party aggrieved" in a certain sum, and shall also be deemed guilty of a misdemeanor, does not apply to the case of a child taken by *habeas corpus* from the custody and control of one parent, on the petition of the other, to whom its custody has been awarded, and afterwards again detained in the custody of the parent first named. *Beyer v. Vanderkuhlen*, 320
2. If the statute applies to the case above defined, the "party aggrieved," in the sense of the statute, is the child so detained, and not the parent entitled to its custody. *Ibid.*

HIGHWAYS.

1. A city charter requires each lot-owner to keep his sidewalk "in a good and safe condition for use," and provides that for injuries occurring to

any person "by reason of a defective sidewalk," the lot-owner shall be liable. *Held*, that such liability attaches for injuries resulting from a smooth and slippery condition of the walk, rendering it unsafe, whether such condition result from the wearing of the surface by use, or from slippery substances placed thereon with the lot-owner's consent, or suffered to remain through his neglect. *Morton v. Smith et al.*, 265

2. As to a slippery and unsafe condition of defendants' sidewalk, resulting from paint placed thereon by other persons, there was no error in submitting to the jury the question whether defendants knew of it, or, in view of the nature of the defect and the length of its continuance, were chargeable with notice. *Ibid.*
3. Where the jury had viewed the walk whose defective condition is alleged to have caused the injury, there was no error in admitting evidence that changes had been made in its condition after the accident and before the view. *Ibid.*
4. In cities of this state, the use, for a series of years, by the people traveling on foot along a public highway, of a part of such highway as a sidewalk or foot path, on one or both sides of the carriage way, constitutes such path or walk a portion of the "traveled part" of such highway, which the city is bound to keep in repair and in safe condition for such use, and renders the city liable for injuries resulting from a neglect of that duty. *James v. City of Portage*, 677

HOMESTEAD.

See EQUITY, 13, 14. FORECLOSURE OF MORTGAGE, 5.

1. The owner of a legal subdivision of land precisely equal to the statutory measure of a homestead right, whose dwelling-house is situate upon such subdivision, and who has made no different selection, will be held to have selected that subdivision for his homestead, although he also owns adjoining lands from which he might have selected his homestead in part. *Kent v. Lasley et al.*, 275
2. C., owning 200 acres of land in one body, conveyed the whole to L., his wife not signing the deed. Afterwards, with his wife, he mortgaged the whole 200 acres to K., who purchased the same at the sale on foreclosure of his mortgage. *Held*, that the deed to L. was inoperative to convey the quarter-quarter section on which C.'s dwelling-house was situate at its date; and that title thereto passed to K. by the foreclosure sale. *Ibid.*

HUSBAND AND WIFE. See ABATEMENT (A.), 1, 2. EQUITY, 14.

INFANCY.

A surety upon an infant's notes for purchase money of chattels, who has paid a judgment upon the notes, and received from the infant a note for the amount so paid, secured by mortgage of the same chattels, is entitled to hold the property as against a subsequent purchaser from the infant with knowledge of the mortgage. *Knaggs v. Green*, 601

INSTRUCTIONS TO JURY. See CRIMINAL LAW, etc., 7, 8, 11, 12. JUDGMENT (I.), 6.

INSURANCE COMPANY. See TAXATION.

INSURANCE AGAINST FIRE.

1. Where the application for an insurance policy is made a part of the contract, and its statements warranties, the fact that at the time of the application there were incumbrances on the property to a much greater amount than was represented by the applicant, avoids the policy. *Schumitsch v. Am. Ins. Co.*, 26
2. The applicant is chargeable with notice of an incumbrance which appears in his claim of title. *Ibid.*
3. Where the applicant was in possession of the land under a bond for a deed when a mortgage of such land was executed by his vendor, the presumption is that the purchase money was not fully paid. *Ibid.*
4. When a policy includes real property and also personal property situate therein, the risk being distributed, it seems that a misrepresentation as to the realty, avoiding the insurance thereon, avoids the whole policy, the contract being entire. *Hinman v. Ins. Co.*, 36 Wis., 159. *Ibid.*
5. Where a policy covering specific kinds of personal property in a building provides that it shall be avoided by any subsequent change of title of such property, and property of the kinds described is subsequently mortgaged and placed, with other property of like character, in the building (where, but for the mortgage, the risk would attach to it), and the assured claims payment for the loss of such mortgaged property, the subsequent mortgage avoids the policy. TAYLOR, J., dissents from this proposition. *Ibid.*
6. The fact that the personal property for which a recovery is claimed, is so covered by mortgages that it is difficult to ascertain the interest of the assured therein, held an additional reason for giving full effect to the clause providing for a forfeiture. *Ibid.*
7. Fire insurance policy, with condition that it should be avoided by additional insurance taken without consent of the secretary of the insurance company indorsed. The application was made to L. and K., local agents of the company, who were mere surveying agents; and was forwarded by them to the company, which sent the policy to the insured from its principal office. Afterwards L. and K. dissolved partnership, but both continued to act as agents for the company, L. becoming a "recording agent," with power to issue policies, etc., and K. continuing to be a mere surveying agent. Subsequently the assured applied to L. for further insurance on the same property, and was referred by him to K. He then applied to K., who sent him to agents for other insurance companies, and these issued to him another policy on the property in another company, and soon after informed K. of the fact, who, with knowledge of the prior policy, took no objection; and the assured was not notified by any person that such additional insurance rendered his former policy invalid. No consent of the secretary was indorsed on the first policy. *Held*,

that for a loss occurring after these transactions, a recovery could be had upon such first policy; L. having so acted that the assured had a right to believe that he consented to the further assurance, and the company being bound by L.'s acts as a waiver or estoppel. *American Ins. Co. v. Gallatin et al.*, 36

8. The mere fact that an application to an agent for insurance is forwarded by him to the company's principal office for approval, is not sufficient to charge the assured with notice of the exact nature and limits of the agent's authority; and, in the absence of other proof that the assured here had notice that K. was only a surveying agent, K.'s consent to the further assurance also binds the company, by way of waiver or estoppel. *Ibid.*
9. This cause is decided (as was *Fleming v. Ins. Co.*, 42 Wis., 616) without reference to sec. 1, ch. 13, Laws of 1871, the construction of which is not determined. *Ibid.*
10. A person employed by the owner of property as a mere watchman or guard thereof, is not by such employment incapacitated to issue a valid policy on the property in behalf of an insurance company of which he is the agent. *Northrup v. Germania Fire Ins. Co.*, 420
11. The views of this court expressed in the opinion upon the former hearing of this cause (45 Wis., 622), adhered to. *Blumer et al. v. Phoenix Ins. Co.*, 535
12. To the questions in a form of application for insurance, prepared by the insurer, "Is there a watchman in the mill during the night? Is the mill ever left alone?" the applicant answered, "No regular watchman, but one or two hands sleep in the mill." *Held*, that the answer was responsive to the questions, and a continuing warranty.
[TAYLOR, J., dissents, holding that the court should in no case treat such an answer as a continuing warranty, unless it can determine as matter of law that the continuance of the custom stated would lessen the risk; and that the court could not so determine in respect to the answer here in question.] *Ibid.*
13. Under ch. 374, P. & L. Laws of 1870, the secretary of the defendant company, who was its general agent for that purpose, received applications of more than fifty persons for insurance and membership in the company, accompanied by their premium notes, etc.; and plaintiff's application and premium note were so received, and his due bill for the ten per cent. and fees required to be paid in advance was accepted by the secretary; and the board of directors thereupon completed the organization of the company. *Held*, that plaintiff (like all other persons whose applications, etc., had been so received up to the time of such organization) was a member of the company, liable to assessment for the payment of subsequent losses of other members, and entitled to a policy upon the property described in his application; although the directors had not formally approved of such application, or indorsed their approval thereon, as required by the by-laws adopted on the day of such organization. *Van Slyke v. The Trempealeau Co. F. M. Fire Ins. Co.*, 683

JOINT DEBTORS. See JUDGMENT (G.).

JUDGMENT.

- (A.) *Form of Judgment.* See EQUITY, 20. FORECLOSURE OF MORTGAGE, 7, 8. MANDAMUS, 1. NEW TRIAL, 1.
- (B.) *Judgment on Certiorari to Justice's Court.* See CERTIORARI, 2.
- (C.) *Judgment in Mandamus.* See MANDAMUS, 1.
- (D.) *Judgment in Foreclosure.* See FORECLOSURE OF MORTGAGE, 7, 8.
- (E.) *Judgment on Administrator's Bond.* See ADMINISTRATORS, etc., 5.
- (F.) *Who bound by Judgment.* See EQUITY, 2-9. RES ADJUDICATA.
- (G.) *Judgment as a Bar.* See ABATEMENT (A.), 1.
1. Judgment against one of several merely *joint* debtors is a bar to a subsequent action against the others, the debt being *merged* in the judgment. *Boicen v. Hastings*, 47 Wis., 232. *Lauer et al. v. Bandow*, 638
 2. In an action against husband and wife to enforce a mechanic's lien for the erection of a building on the wife's lot, a personal judgment was obtained against the husband alone, and a lien adjudged upon the wife's house and lot. After reversal of *the latter part* only of the judgment, the circuit court, on affidavits tending to show merely a joint liability of the wife with the husband, without vacating the personal judgment against the husband, permitted the complaint to be amended so as to allege the wife's personal liability, and granted a new trial. *Held*, error. *Ibid.*
- (H.) *Vacating Judgment.*
1. On appeal from the judgment in an attachment suit, the appellant not having moved to vacate the judgment because rendered before trial of his traverse to the attachment, nor assigned that ground for reversal here, the judgment was affirmed. *Held*, that it was then too late to move the court below to vacate the judgment on the ground above stated. *Bassett v. Hughes*, 23
 2. After a note running to plaintiff and indorsed by K. was past due, K. indorsed a second note, executed to plaintiff by the same makers, to take up the former; and this second note was delivered to plaintiff without requiring a surrender of the first. In an action on the second note, K. having made default, and judgment having gone against him as well as the makers, he afterwards, upon affidavits to excuse his default, moved to vacate the judgment against him and for leave to answer, on the ground that the second note was not to take effect except upon surrender of the first, and that plaintiff still held the first, and had refused to surrender it on demand. Plaintiff's counter affidavits tended to show that the first note had never been demanded, and that plaintiff had always been ready to surrender it; and it was in fact surrendered to one of the makers before the motion was heard. *Held*, that it does not appear that K. could have been injured by plaintiff's retention of the first note, or is injured by the judgment; and his motion was properly denied. *Nat. Bank of Neenah v. Ketchum*, 649

(I.) *Reversal of Judgment.*

See APPEAL (A.). BASTARDY ACT, 3. CRIMINAL LAW, etc., 12.
EXECUTION, 2. VERDICT, 1.

1. Where there was evidence which, uncontradicted, would support the verdict, and a new trial has been denied, this court (unless in an extreme case) will not reverse the judgment. *Meusel v. Semple*, 86
2. There being some evidence tending to support the finding of the jury as to the value of the services in question, this court cannot reverse on the ground that the amount awarded is excessive. *Meese v. City of Fond du Lac*, 323
3. In view of the plaintiff's age and business at the time of the injury here in question, his previous ability to earn money by his labor, the permanent disablement of his right hand by the accident, and the pain and suffering endured, this court does not find in a verdict for \$4,500 such evidence of passion or prejudice in the jury as would warrant a reversal for excessive damages. *Schultz v. C., M. & St. Paul Railway Co.*, 375
4. The fact that, in an action at law, only one of three issues of fact made by the pleadings was submitted to or passed upon by the jury, is held no ground for reversing a judgment for the plaintiff (in whose favor the third issue was found), where there was evidence on plaintiff's part to sustain the judgment, and no conflicting evidence that was admissible. *Fick v. Mulholland*, 473
5. The jury having apparently found that the injuries complained of were serious and permanent, and having awarded plaintiffs a verdict for \$1,800, this court, not being able to say that the finding was unsupported by the evidence, cannot hold the damages excessive. *Quaife et ux. v. C. & N. W. Railway Co.*, 513
6. A judgment will not be reversed merely because general terms were used in an instruction, which might have been made more definite and certain, where the appellant did not call the judge's attention to the point at the time, nor ask for more specific instructions (but merely took a general exception to the instruction), and the terms used, in view of the whole charge, could not mislead the jury. *Lela et ux. v. Domaske et ux.*, 623
7. A judgment supported by the special findings of fact, in an action tried by the court alone, will not be reversed unless there appears to be a clear preponderance of evidence against such findings. *Jenkins et al. v. McCurdy*, 623

JUDICIAL SALE. See EQUITY, 7-9.

JURISDICTION. See CONTEMPT, 1-6, 9. EMINENT DOMAIN, 1-3. EQUITY, 2, 3, 5, 6, 16, 17. FORECLOSURE OF MORTGAGE, 9. PARTITION.

JUSTICES' COURTS. See CERTIORARI. GARNISHMENT. PLEADING, 4.

LACHES. See EQUITY, 11, 12. MANDAMUS, 4.

LANDLORD AND TENANT.

See RES ADJUDICATA. VENDOR AND PURCHASER, 3.

- K. attempted orally to lease premises to G. for two years at a specified sum per year, payable "at such times during the term as plaintiff should require;" and G. went into possession under the lease, and remained in possession twenty months, paying the first year the specified rent therefor when demanded, and also paying at the same rate until the end of the next six months. *Held*, that though the lease was void by the statute of frauds, G. became a *tenant from year to year on the terms* therein stipulated. *Koplitz v. Gustavus*, 48

LIBEL AND SLANDER.

A communication to a "Commercial Agency" from its local correspondent, as to the commercial standing of a person doing business in any place, is so far privileged in the hands of the persons conducting such agency, that they may lawfully make known its contents confidentially to their subscribers seeking information upon that subject; provided this is done without malice and in the belief that the statements are true. *State ex rel. Lanning et al. v. Lonsdale*, 348

LIEN.

(A.) *Of Mechanics and Material Men.* See MECHANIC'S LIEN.

(B.) *On logs, for labor, etc.* See AMENDMENT (A.).

(C.) *Assignment of Claim secured by Lien.*

The general rule in this state is, that, in the absence of any statutory provision to the contrary, the assignment of a claim for which the assignor may have by law a specific lien, before action, destroys the right to the lien (*Caldwell v. Lawrence*, 10 Wis., 331); and a reassignment to him does not revive the lien. *Teuksbury v. Bronson et al.*, 581

LIMITATION OF ACTIONS. See ASSIGNMENT, 2. MANDAMUS, 3. TAX PROCEEDINGS, etc., 1, 2.

LOGS }
LUMBER } See AMENDMENT (A.).

MANDAMUS.

1. After judgment (or order) awarding a peremptory *mandamus*, a separate judgment, in form, was entered for costs in favor of the relator; and the defendant appealed from the first-named judgment or order, and after-

wards "from the whole judgment." *Held*, that there was in fact but a single judgment, awarding the writ with costs; and the first appeal is dismissed. *State ex rel. Mulholland v. Co. Clerk*, 112

2. The county clerk has no legal authority to issue county orders except by express direction of the board of supervisors, by a "recorded vote" to that effect; and *mandamus* will not lie to compel him to issue them without such direction. *Ibid.*
3. Whether the statute of limitations is applicable directly, or will be applied by way of analogy, to a proceeding by *mandamus*, is not here decided. *State ex rel. The G. B. & M. R. R. Co. v. Jennings et al.*, 549
4. Where a *mandamus* to compel the issue of town bonds to a railway company in exchange for its stock, was not asked for until nearly six years after the relator's right accrued: *Held*, that, in exercising the *discretion* of the court in reference to the writ, the delay would not be treated as *laches*, in the absence of any evidence that the town was injured thereby, especially as the contract was mutual, and it had been, at all times since the relator's road was built, in the power of the town to enforce an exchange of its bonds for stock of the company. *Ibid.*

MARRIED WOMAN. See EQUITY, 14.

MASTER AND SERVANT. See CONTRACTS, 4, 5.

MECHANIC'S LIEN.

1. Where one entitled to a mechanic's lien has in good faith filed a petition in time, but, through mistake, it is imperfect (as where it describes the premises incorrectly), the court in which suit is brought to enforce the lien may permit an *amendment* of the petition, as against all persons who have not in the meantime acquired vested rights in respect to the premises. R. S., secs. 3320, 4980. *Sherry v. Schraage*, 93
2. A voluntary and unconditional delivery to the owner, of property on which a mechanic's lien has accrued, is a waiver of the lien; and, except in case of fraud and perhaps mistake, such lien cannot be restored by resumption of possession. *Sensenbrenner v. Mathews et al.*, 250

MONEY HAD AND RECEIVED. See AGENCY. CITIES, 2.

MORTGAGE. See ASSIGNMENT, 4. CHATTEL MORTGAGE. EQUITY, 10, 14.

MOTION. See BILL OF EXCEPTIONS. PARTITION, 2. PRACTICE, 4, 5.

NEGLIGENCE. See EVIDENCE, 7. RAILROADS, 3-6.

NEW TRIAL.

See BASTARDY ACT, 2.

1. In case of a verdict for excessive damages, where the jury appear not to have been influenced by prejudice, passion or bias, a new trial may be granted, unless plaintiff remit the excess; but the court should not require plaintiff to remit a portion of the damages, and at the same time deprive defendant of the benefit of the reduction unless he shall submit to onerous terms; as by directing judgment to be entered for plaintiff for the whole amount of the verdict upon his filing a stipulation that if defendant shall, within sixty days, pay him a certain smaller sum, with the costs, he will enter a full satisfaction of the judgment. *Schultz v. C., M. & St. Paul Railway Co.*, 375
2. On a motion for a new trial upon the ground that the verdict is against the weight of evidence, the order of the circuit court, whether it grant or deny the motion, will not be reversed by this court, except where there was an abuse of discretion, or where the order appears to have proceeded upon an erroneous view of the law. *Smith v. Lander*, 587
3. A new trial should not be granted on the ground above stated (where the verdict does not appear to have been perverse or corrupt), except upon terms of paying the costs of the former trial. *Ibid.*
4. On reversing a judgment in this cause, on a former appeal, this court directed that if plaintiffs should satisfy the circuit court that they were able to obtain evidence showing that defendant's testator, when he purchased the land here sought to be redeemed, had notice of plaintiffs' claim of an equity of redemption, it should grant a new trial; and that otherwise the complaint should be dismissed. 45 Wis., 60. When the case was remitted, a new trial was granted upon an affidavit of plaintiffs' counsel that he had seen and conversed with the witnesses, and that plaintiffs could prove, by the most trustworthy and reliable testimony, that such testator had actual notice of their claim before taking his conveyance. *Held*, no error. *Helms et al. v. Chadbourne et al.*, 690

NOTICE.

1. *Of Assignment.* See BILLS AND NOTES, 1 (2).
2. *Of Incumbrance.* See INSURANCE, etc., 2.
3. *Of Remittitur.* See PRACTICE, 1.
4. *Of Defective Highway.* See HIGHWAY, 2. PLEADING, 1.

OFFICER. See CITIES, 1, 3. EVIDENCE, 11. EXECUTION.

OVERSEER OF HIGHWAYS. See EVIDENCE, 11.

PARTIES. See EQUITY, 2, 3, 5, 6, 19.

PARTITION.

1. A sale was made in partition in the absence of many of the parties in interest, and other persons, who were kept away by a reasonable expectation that the proceedings would be stayed; and it was for a very inadequate price, much less than one of such absent parties would have bid, and little more than half what the purchaser bid a few days before, when his offer was not accepted by reason of a stay; and the proceedings were conducted hastily, with knowledge that an appeal had been taken, and that a further stay pending the appeal would soon be made. *Held*, that the court erred in refusing to vacate the sale. *Kemp et al. v. Hein et al.*, 32
2. Parties to a partition suit, whether made plaintiffs or defendants thereto, may appeal from an order by which they are aggrieved, and make the other parties to the suit, whether plaintiffs or defendants, respondents to the appeal; and any irregularity in respect to parties in such appeal, is waived by the appearance of the respondents by attorney at the hearing, without motion to dismiss for such irregularity. *Ibid.*

PARTNERSHIP.

See EVIDENCE, 3.

Complaint in justice's court, "that defendants are *indebted*" to plaintiff "in manner following: for a stove lent to defendants . . . of the value, etc., . . . which defendants have never returned to plaintiff, and refused to return when demanded." *Held*, an action *ex contractu*; and on proof (upon appeal to the circuit court) that the stove belonged to plaintiff and another person, as copartners, a nonsuit should have been granted. *Slutts v. Chafee et al.*, 617

PERSONAL PROPERTY. See REAL PROPERTY. See also ASSIGNMENT. ATTACHMENT. BILLS AND NOTES. CHATTEL MORTGAGE. CITIES, 1, 2. EXECUTION. EXEMPTION, 1. INFANCY. JUDGMENT (H.), 1. LIEN (C.). PLEADING, 3. RECORDING OR REGISTRY ACTS. REPLEVIN. SALE OF CHATTELS.

PLEADING.

See ABATEMENT, 1. ADMINISTRATORS, etc., 1. AMENDMENT (A.). CRIMINAL LAW, etc., 16. PARTNERSHIP. PRACTICE, 5, 6.

1. In an action against a town for injuries suffered in 1875 by reason of a defective highway, notice in writing to the town board, of the character defined in ch. 86 of the laws of that year, must be alleged. *Susenguth v. Town of Rantoul*, 334
 2. The complaint, after averring injuries to plaintiff from a defective highway of the town, alleged as "another and further cause of action," that, "by reason of said injury so received as herein set forth," plaintiff was
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wholly unable to carry on a certain manufacturing business in which he had previously been engaged, and that he lost in consequence a large amount of trade, to his damage, etc. This count, not otherwise averring any defect in the highway, or that the injury was caused thereby, is *held* insufficient, on demurrer. *Ibid.*

3. The complaint alleges that, on etc., defendant broke and entered upon plaintiff's farm, and took from his possession certain personal property of the plaintiff, carried it away and converted it to his own use. *Held*, an action *de bonis asportatis*, and not of trover. *Grafton v. Carmichael*, 660
4. A complaint in justice's court, though informal, is sufficient if it states a cause of action so that a person of common understanding would have no difficulty in knowing what is intended. *Hall v. C., M. & St. Paul Railway Co.*, 317

PLEDGE. See BILLS AND NOTES, 1.

PRACTICE.

See ADMINISTRATORS, etc., 4. APPEAL (A.), 3. ATTACHMENT, 4, 5. BASTARDY ACT. BILL OF EXCEPTIONS. CERTIORARI. CHANGE OF VENUE. CONTEMPT. COSTS. DEPOSITION. EQUITY, 19, 20. FORECLOSURE OF MORTGAGE. GARNISHMENT. JUDGMENT (G.), 2. JUDGMENT (H.), 1. MANDAMUS, 1. NEW TRIAL, 3. PARTITION. STAY OF PROCEEDINGS. VARIANCE.

1. After reversal here of a judgment, no further proceedings can properly be taken in the cause in the court below until the record has been remitted to that court; and proper practice requires notice of the filing in that court of the record so remitted to be given to the opposite party before any further proceedings are taken. *Troubridge v. Sickler*, 424
2. In this case, therefore, the circuit court having made an order dismissing the action, etc., on the ground that more than a year had elapsed since the reversal of the judgment and the award of a new trial by this court, and that plaintiff (who was respondent in that appeal) had failed to procure a *remittitur* of the record, and had taken no proceeding in the action, such order was afterwards properly vacated on plaintiff's motion. *Ibid.*
3. Whether it was the duty of the plaintiff and respondent to pay the costs in this court, and procure a *remittitur*, is not here determined. *Ibid.*
4. Where plaintiff dies while the cause is pending on demurrer to the complaint, and the court makes an order reviving the action in the name of one who petitions therefor as executor of such deceased, and defendant afterwards appears and argues the demurrer, without moving to set aside the order, either for want of notice to him of the petition, or on the ground that such order was made without sufficient evidence of the petitioner's representative character, this is a *waiver* of those objections. *Brooks, Ex'r, v. Northey et al.*, 455

5. Plaintiffs' failure to set out the conveyance and lease or defeasance can be reached only by motion to make the complaint more definite and certain, and not by general demurrer. *Bishop et al. v. Aldrich et al., imp.*, 619
6. On overruling such a demurrer, it was competent for the court to require defendants to pay ten dollars, in addition to the taxable costs of the order, as a condition of leave to answer. *Ibid.*

PRESUMPTION. See APPEAL (A.), 1, 5. BILLS AND NOTES, 1 (2). CERTIORARI, 1. CRIMINAL LAW, etc., 14. EVIDENCE, 11, 12. INSURANCE, etc., 3. TAX PROCEEDINGS, etc., 5.

PRINCIPAL AND SURETY. See SURETYSHIP.

PROBATE COURT. See ADMINISTRATORS, etc., 1-4.

PROMISSORY NOTES. See BILLS AND NOTES.

RAILROADS.

1. It is *res adjudicata* in this case (43 Wis., 183), that plaintiff is entitled to recover all the damages he had sustained up to the commencement of the action, from defendant's trespass in constructing, maintaining and operating its railroad on his land in a public street (only six inches in width of the track being upon said land), and that the fact that a part of the road was at the same time constructed and operated upon adjoining lands not owned by the plaintiff, cannot be considered for the purpose of lessening the damages. *Blesch v. C. & N. W. Railway Co.*, 163
2. Under the constitution and laws of this state, where lands are taken for the purpose of building and operating a railroad thereupon, the "just compensation" which the railroad company is required to pay, includes "the value of the lands actually taken, and the damages sustained by the owner by reason of the taking thereof" for such purpose; and the fact that the value of the owner's other lands, adjoining those taken, and used in connection with them, would be diminished by the proximity of the road, if it were built close to but not upon his land, cannot be considered for the purpose of lessening the damages; and an equally liberal rule in favor of the land-owner applies in case of a trespass by an illegal taking for the same purpose. *Ibid.*
3. Prior to ch. 173 of 1875 plaintiff was injured by a defective pile-driver while in the employ of the defendant company as one of a crew engaged in working such machine under L., defendant's foreman in charge of the driver, who had full authority to have it repaired when out of repair, and to hire and discharge the crew, and who knew that the machine was in a dangerous condition, in time to have it repaired before the injury. *Held*, that the foreman's negligence was the negligence of the defendant, and rendered it liable for the injury. *Brabbitt v. Railway Co.*, 38 Wis., 289. *Schultz v. C., M. & St. P. Railway Co.*, 375

4. In an action against a railway company for injuries received by plaintiff, from collision with a train, while driving his team and wagon across defendant's road, the court cannot say, as matter of law, that ordinary care required plaintiff to stop his team and listen for the train; or that trotting his team to within a rod of the track was negligence, even though he knew that the train usually passed the crossing at about that time in the day; but these questions are for the jury. *Eilert v. The G. B. & M. R. R. Co.*, 606
5. Evidence that, by reason of excavations, the formation of the land in the vicinity, and the presence of timber near the crossing, it was somewhat difficult for persons near it on the highway to see an approaching train, would support a finding by the jury that a failure to signal the approach of the train (by bell or whistle) was negligence, although such signals were not then required by statute. *Ibid.*
6. Such a finding may be supported by mere negative testimony, notwithstanding positive testimony on defendant's part that signals were given. *Urbanek v. Railway Co.*, 47 Wis., 59. *Ibid.*
7. Where property is necessarily used by a railway company in operating its road, it is not required, in order to exempt it from local taxation (under subd. 13, sec. 2, ch. 130, Laws of 1868), to be used *exclusively* for railway purposes, but it is sufficient if that is clearly shown to be its *principal* use. *C. & St. P. Railway Co. v. The Board of Supervisors of Crawford County et al.*, 666
8. Thus, where it appears that it was necessary, in 1873, for the proper accommodation of persons traveling by defendant's railway, that defendant should maintain an eating and lodging house for them at Prairie du Chien, adjacent to its road, and that a certain building owned by defendant, upon its land adjacent to its road, was principally used for that purpose, more than nine-tenths of its business, probably, consisting in furnishing entertainment to travelers by and employees upon said railway, it is *held* to have been exempt from local taxation; and the facts that plaintiff's tenant (not charged with rent) by whom it was conducted, took the profits thereof, and that commercial travelers, reaching and leaving Prairie du Chien by railroad, were entertained at the house for one or more days while transacting their business in that vicinity, will not prevent such exemption, where the house was not kept as a general hotel for the accommodation of the whole public. *M. & St. P. Railway Co. v. City of Milwaukee*, 34 Wis., 271, followed; and *M. & St. P. Railway Co. v. Board of Supervisors*, 29 id., 116, distinguished. *Ibid.*

RAILROAD AID. See TOWNS, 1, 2.

RATIFICATION. See CONTRACTS.

REAL PROPERTY.

See BOUNDARIES. DEED. EMINENT DOMAIN. EQUITY. ESTOPPEL. FORECLOSURE OF MORTGAGE. RAILROADS, 1, 2, 7, 8. RES ADJUDICATA. TAX PROCEEDINGS, etc. VENDOR AND PURCHASER.

1. What is in its nature, otherwise, personal property, nevertheless, when

physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title to the realty. *Jenkins et al. v. McCurdy*, 628

2. While "slabs, sawdust, shavings and other refuse matter, used to fill up low and marshy ground," may be a part of the realty, "slabs and pieces of lumber suitable for firewood, piled up on the premises and intended to be used and removed as such," are personal property. *Ibid.*

RECEIVER. See FORECLOSURE OF MORTGAGE, 1-5.

RECORDING OR REGISTRY ACTS.

See ASSIGNMENT, 3-5.

1. Sec. 19, ch. 42, Tay. Stats. (p. 757), refers to mortgages and other instruments affecting title to logs already cut and marked when such instruments are executed, and not to sales or mortgages of standing timber. *Cadle et al. v. McLean*, 630
2. By the terms of a written instrument, defendant sold T. & Co. all the merchantable pine timber standing on certain lands; T. & Co. were to place a certain mark on the end of each piece of timber cut, and to cause the timber to be manufactured into lumber and shingles, but were not to sell or otherwise dispose of any timber or lumber manufactured therefrom until the purchase money should be paid; the rights of property in and possession of the timber and lumber were to remain in defendant until such payment; and he had full power to take possession and sell, on notice. *Held*, that the contract was either a conditional sale of personal property by defendant, or a chattel mortgage to him, taking effect as the timber was cut; and in either case the filing of the instrument in the proper clerk's office without recording it in the registry of deeds, was sufficient (under ch. 113 of 1873, or Tay. Stats., 769, sec. 3), to protect defendant's rights against a subsequent purchaser from T. & Co. *Ibid.*

RECOUPMENT. See SALE OF CHATTELS, 6.

REFORMATION OF WRITTEN INSTRUMENT. See EQUITY, 11-15.

REMITTITUR. See PRACTICE, 1-3.

REPLEVIN.

In replevin, plaintiff recovers on his own right of possession, not on the weakness of defendant's right. *Sensenbrenner v. Mathews et al.*, 250

RES ADJUDICATA.

See RAILROADS, 1.

The judgment in ejectment against a tenant of the land *held* not to be binding in a subsequent action of ejectment by the same plaintiff for the same land, against the landlord; and a question determined in the former, not to be *res adjudicata* in the latter. *Kent v. Lasley et al.*, 257

REVIVOR OF ACTION. See PRACTICE, 4.

SALE OF CHATTELS.

See ASSIGNMENT, 5. RECORDING OR REGISTRY ACTS.

1. One who receives goods sent to him, knowing that the sender claims that the receiver has purchased them of him, cannot, in the absence of mistake or fraud, appropriate them to his own use, and then disclaim the purchase. *Wellauer et al. v. Fellows*, 105
2. The word "Terms Cash" upon an unreceipted bill of goods sent by a wholesale to a retail dealer, cannot be held, as matter of law, to imply that the goods were paid for before they were shipped. *Ibid.*
3. An agreement by the vendor of a "heater," "to protect the sale from infringements on other heaters," construed as a warranty that the article sold was not an infringement of any patent. *Croninger et al. v. Paige*, 229
4. In a suit by the vendor in such contract, for the purchase price, the vendee may defend on the ground that the article sold was in fact an infringement of a patent, and that, within a reasonable time, he offered to return it upon that ground, and has kept the offer good. *Ibid.*
5. If the vendee has not kept good his offer to return, he may counterclaim in the vendor's action the damages accruing to him from the fact that the article infringes a patent, viz: the difference between the value of the article with the right to use it, and its value without that right. And where it appears that the right can be purchased for less than the price of the article, the price of the right is generally the measure of his damages. *Ibid.*
6. On a sale of a chattel, with a warranty express or implied, in the absence of fraud on the vendor's part, if the article is not as warranted, the purchaser may return or offer to return it within a reasonable time (where the time is not fixed by special contract), and thus defeat the vendor's right to recover any part of the price, or may keep it, and, in an action for the price, recoup damages for breach of the warranty; but in such action the vendor may recover the real value of the chattel, if any, notwithstanding its total unfitness for the uses for which it was purchased. *Warder et al. v. Fisher*, 338

7. In an action for the price of a reaper, where plaintiff's evidence tended to show a sale with special warranty, and defendant's evidence tended to show that there was *no sale*, it was error to instruct the jury that, "if there was a contract of sale, and the machine was *wholly unfit for the uses for which it was constructed* and purchased, there was an entire failure of consideration, and defendant was not required to return or offer to return the machine or to pay for it." *Ibid.*

SALE BY JUDGMENT OR ORDER OF COURT. See EQUITY, 7-9. FORECLOSURE OF MORTGAGE, 9. PARTITION.

SLANDER. See LIBEL, etc.

SPECIAL VERDICT. See VERDICT.

STATUTES CITED, Etc.

SESSION LAWS.	SESSION LAWS — (continued).
1858. P. & L., ch. 93, subch. vi, sec. 1, - 679	1873. Ch. 113, - - - 631, 637
1858. P. & L., ch. 93, subch. vii, sec. 7, - - - 679	1873. " 299, - - - 91-3
1859. Ch. 113, - - - 586	1874. " 154, sec. 4, - - 586
1860. Chs. 31, 49, - - 571, 573	1874. " 291, " 2, - - 385, 405
1860. Ch. 125, sec. 2, - - 363	1875. " 86, - - - 334, 337
1860. " 264, " 2, - - 83	1875. " 173, - - - 375, 379
1860. " 264, " 10, - - 69	1877. " 143, secs. 1, 2, 7, 545, 546
1860. " 301, - - - 572, 573	1877. " 162, - - - 553
1860. " 323, sec. 4, - - 75, 78	1878. " 334, 567, 569, 570, 572
1860. " 333, - - - 572, 573	1878. " 334, secs. 2, 12, 558, 561-3
1862. P. & L., ch. 48, - - 572, 573	
1862. Ch. 120, sec. 5, - - 75, 78	1879. Ch. 255, 563, 567, 570, 572, 576
1862. " 243, " 3, - - 547	1879. " 255, sec. 4, - - 566
1866. P. & L., ch. 474, subch. vii, sec. 21, - - - 161	REVISED STATUTES OF 1849.
1867. P. & L., ch. 93, 550, 552, 555, 557	Ch. 16, sec. 123, - - - 161
1868. Ch. 130, sec. 2, subd. 13, - 666	REVISED STATUTES OF 1858.
1868. P. & L., ch. 501, - - 92	Ch. 5, sec. 1, - - - 558, 561
1869. P. & L., " 298, sec. 9, - 266	" 13, " 59, - - - 114
1869. P. & L., " 362, - - 553	" 19, " 120, - - - 679
1870. Ch. 56, - - - 91, 92	" 86, secs. 25, 34, 35, - 243
1870. P. & L., ch. 275, subch. v, sec. 14, - - - 314	" 101, sec. 1, - - - 218
1870. P. & L., ch. 275, subch. vi, sec. 7, subd. 20, - - 314	" 104, " 4, - - - 102
1870. P. & L., ch. 374, - - 683, 684	" 120, secs. 119, 120, 130, 461, 466
1870. P. & L., " 374, secs. 21, 23, 25, 26, - - - 685	" 137, sec. 55, - - 601
1870. P. & L., ch. 374, sec. 40, - 686	" 149, secs. 21, 23, - 348, 366
1870. P. & L., ch. 485, - - 553	REVISED STATUTES OF 1878.
1871. Ch. 13, sec. 1, - - 37, 47	Section 636, - - - 114
1872. " 119, - - - 406	" 709, subd. 3, - - 114
1873. " 96, - - - 323, 327	" 770, - - - 75
	" 1164 b, - - - 566
	" 1176, - - - 558, 660

STATUTES CITED, Etc. — (continued).

REVISED STATUTES OF 1878 — (con.)			REVISED STATUTES OF 1878 — (con.)		
Section	1178, - - -	558, 560	Section	4073, - - -	647, 658
"	1210 <i>a</i> , - - -	567, 576	"	4096, - - -	601
"	1210 <i>b</i> , - - -	567, 569, 570, 576	"	4109, - - -	365
"	1339, - - -	679	"	4253, - - -	328
"	1809, - - -	610	"	4410, - - -	683-9
"	1977, - - -	48	"	4637, - - -	689
"	2075, subd. 5, - -	116, 133	"	4971, - - -	558, 561
"	2081, - - -	133	"	4980, - - -	94, 97, 545
"	2182, - - -	219	"	5686, subd. 5, - -	683
Sections	2241-2, - - -	243	TAYLOR'S STATUTES.		
Section	2295, - - -	509, 511, 512	Page	297, § 35, subd. 2, -	114
"	2433, - - -	364	"	301, 49, - - -	114
"	2680, - - -	323, 327	"	308, 85, - - -	114
"	2681, - - -	477, 482	"	437, 166, - - -	558, 560
"	2745, - - -	23, 26	"	482, 25, - - -	541
"	2858, - - -	196, 375, 378	"	490, 60, - - -	541
"	2899, - - -	546	"	513, 156, - - -	679
"	2902, - - -	546	"	757, 19, - - -	630, 635
"	2949, - - -	94, 99	"	769, 3, - - -	631, 637
"	3067, - - -	427	"	1134, 5, - - -	207
"	3069, subd. 1, - -	66, 69	"	1165, 2, - - -	53
"	3071, - - -	428	Pages	1229-30, §§ 20, 21, -	309
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"	3162, - - -	545, 546	"	1254, § 6, 8, - - -	51
"	3169, - - -	544, 545, 548	"	1362, 51, - - -	318
"	3320, - - -	94, 97	"	1470, 7, - - -	598
"	3443, - - -	320	Pages	1475-6, §§ 29-32, -	23, 25
"	3477, - - -	348, 365	Page	1476, §§ 32, 34, -	593, 598
Sections	3490-91, - - -	348, 366	"	1635, - - -	69
Section	3626, - - -	318	"	1772, § 45, - - -	586
"	4063, - - -	349, 367	"	1799, § 32, - - -	320, 321
"	4066, - - -	348, 363, 365			

STATUTES, CONSTRUCTION OF. See TAX PROCEEDINGS, etc., 13.

STATUTES, REPEAL OF. See TAXATION, 1. TAX PROCEEDINGS, etc., 13.

STAY OF PROCEEDINGS.

1. On reversal by this court of a judgment in favor of the plaintiff in an action, the circuit court has power to stay his further proceedings therein until he shall pay the costs adjudged against him on the appeal; and the order, being grantable at discretion, is not appealable. *Pelt v. Amidon et al.*, 66
- [2. Plaintiff's remedy in case he deems the stay unreasonable, somewhat considered per TAYLOR, J., but not determined; and cases suggested in which an order staying proceedings until a specific act be performed, may be appealable under subd. 1, sec. 3069, R. S.] *Ibid.*

SUBROGATION. See EQUITY, 10.

SURETYSHIP.

See BILLS AND NOTES, 2-4.

1. A judgment against the principal in an official bond, appearing by the record to have been recovered for acts or omissions which would be a breach of the conditions of the bond, is admissible against the sureties, in an action upon the bond, as at least *prima facie* evidence of plaintiff's right to recover, and of the amount he is entitled to recover. *Stephens v. Shafer et al., imp.*, 54
2. A surety for the performance of a contract is discharged by any subsequent material change therein. *Nichols, Adm'x, v. Palmer et al.*, 110
3. Thus, where, during the life of a lease for three years, an agreement was entered into by lessor and lessee, by which the latter was to surrender the premises at the end of the second year, and pay certain sums, etc., in full of all rent due under the lease: *Held*, that a surety for the performance, by the lessee, of the original lease was discharged by such agreement. *Ibid.*

TAXATION.

See RAILROADS, 7, 8.

The general law regulating the payment by insurance companies doing business in any city or village of this state, of a tax consisting of two per cent. of their premiums (ch. 56 of 1870, amended by ch. 299 of 1873), operated to repeal all special provisions of city and village charters on that subject. *Fire Department of Oshkosh v. Tuttle*, 91

TAX PROCEEDINGS, TAX DEEDS, TAX TITLES, Etc.

See CITIES, 1, 2.

1. Under the general law, if any person other than the grantee in a tax deed of land, or one claiming under him, actually occupies the land during the three years next after the recording of the tax deed, such grantee loses all title under the deed; and under the charter of the city of Janesville, such a grantee loses title, under like circumstances, after the expiration of *one* year from the recording of the deed. *Smith v. Ford*, 115
2. If the grantee in the tax deed has peaceable possession of a *part* only of the premises during the period limited, he acquires an indefeasible title to *that part*, but not to the remainder, which is adversely possessed. *Ibid.*
3. Where a raceway (into which the waters of a river were turned by a dam), and a roadway connected therewith, were constructed for the sole benefit of persons owning lots abutting upon them, *it seems* that persons purchasing such lots with the right of drawing water from the raceway

- would take the land under the race and roadway, opposite their lots; and that such lands could not be assessed and taxed separately from such lots. But the question is not here decided.] *Ibid.*
4. A tax deed executed under Tay. Stats., p. 437, § 166, or R. S. 1878, sec. 1178, is sufficient if in the form prescribed by the statute, though it fails to show the year for whose delinquent taxes the lands were sold; and such deed is *prima facie* proof of the grantee's title. R. S., sec. 1176. *Marshall v. Benson et al.*, 558
 5. As the statute directs sales of lands for delinquent taxes of one year to be made in May of the following year, and does not direct that for taxes of former years, the collection of which has been enjoined, the lands shall be sold at that time if released from the injunction, it must be *presumed* that a sale in May, 1874, as recited in the tax deed, was for delinquent taxes of the preceding year. *Ibid.*
 6. Where taxes are required by law to be assessed in a city by a board of assessors (one elected in each ward), an affidavit to the assessment roll, made by a majority of the board, is sufficient, in the absence of any express provision in the city charter taking the case out of the general rule of the statute. R. S. 1858, ch. 5, sec. 1; R. S. 1878, sec. 4971. *Ibid.*
 7. In such a case, the affidavit began: "I, N., assessor for the first ward, . . . do solemnly swear that the annexed assessment roll contains, as we verily believe, a complete and perfect list," etc., etc.; "that I have, as far as practicable, valued each parcel," etc.; and it continued thereafter to use the *singular* pronoun, but was signed by a majority of the assessors. The jurat was: "Read to the affiant, and subscribed and sworn to before me," etc. The blank used was one prepared by the secretary of state, adapted to towns, or municipalities having but one assessor. *Held*, that the verification was sufficient. *Ibid.*
 8. Where the question was as to the validity of a tax sale, evidence of the rule followed in assessing taxes for *other* years than that for whose taxes the sale was made, and of the *common report* as to the rule followed in the latter year, was inadmissible. *Ibid.*
 9. The view taken in *Plumer v. The Supervisors*, 46 Wis., 163, that sec. 12, ch. 334 of 1878 (providing that "no assessor shall be allowed, in any court or place, by his oath or testimony, to contradict or impeach any affidavit or certificate made or signed by him as such assessor"), is valid, adhered to. *Ibid.*
 10. Under such a statute, evidence of statements or admissions of the assessor cannot be received to impeach his certificate, even if such evidence would be admissible independently of the statute. *Ibid.*
 11. Mere proof that, in an assessment of the property in a city for taxation, there was an undervaluation in a few cases, is not sufficient to show the whole assessment illegal. *Ibid.*
 12. Ch. 334 of 1878, as amended by ch. 255 of 1879 (by which one who seeks by suit to avoid a tax for irregularities going to the groundwork thereof, can obtain that relief only upon payment of the tax justly chargeable against him, ascertained by a proper reassessment as there provided for), is valid; and it applies to suits commenced before but tried after its passage. *Flanders v. Town of Merrimack et al.*, 567

13. Where a statute still in force refers to one since repealed, the latter may be resorted to for the purpose of construing the former; and, notwithstanding the repeal of section 1210 *a*, R. S. 1878, the words of section 1210 *b*, "any of the causes mentioned in sec. 1210 *a*," etc., are to be understood as if the enumeration of causes thus referred to were incorporated in sec. 1210 *b*. *Ibid*.

TORTS. See ATTACHMENT, 6, 7. BASTARDY ACT. CITIES, 1. CONTEMPT. EMINENT DOMAIN, 6. PLEADING, 3. RAILROADS, 1-6.

TOWNS.

See PLEADING, 1.

1. Ch. 93 of 1867 (under which the contract was made) did not confer upon the town officers any discretion as to issuing the bonds *after* a submission by them of the relator's proposition to a vote of the electors, and an acceptance thereof by such vote; but the agreement spoken of in the act, between such officers and the railroad company, was *preliminary* to the submission, and, when made, was a *contract* between the town and company, with an affirmative vote of the town as a condition precedent. *State ex rel. G. B. & M. R. R. Co. v. Jennings et al.*, 549
2. There is nothing in said ch. 93 which requires the town to sell its stock; and its contract to retain the same until the relator consents to a transfer thereof, is valid. *Ibid*.

TRESPASS.

1. *Trespass to Land*. See RAILROADS, 1, 2.
2. *Trespass ab initio*. See ATTACHMENT, 6, 7.

TRIAL. See ATTACHMENT, 1, 2.

TROVER. See PLEADING, 3.

TRUSTS. See EQUITY, 1, 3-5, 7-9.

UNLAWFUL DETAINER. See VENDOR AND PURCHASER, 3.

USURY. See BILLS AND NOTES, 3.

VARIANCE.

If the answer, while alleging (by way of defense) the infringement and defendant's offer to return, does not count upon the contract in accordance with the construction here given it, still, the contract being put in evidence by plaintiff, the variance may be disregarded, or the answer amended. *Croninger et al. v. Paige*, 229

VENDOR AND PURCHASER.

1. The mere fact that the vendor of land by executory contract (containing a representation or warranty that he has the title) has not acquired the legal title when an intermediate installment of the purchase money becomes payable by his vendee, is no defense to his action for such installment, where by the contract the deed is not to be made until payment of the last installment, which will not become due for a considerable length of time. *Diggle v. Boulden*, 477
- [2. In an action for strict foreclosure of such a contract, even for non-payment of the *last* installment of the purchase money, where defendant is in possession of the premises, the fact that plaintiff has not the title is no defense, unless defendant has offered to rescind the contract and surrender the possession. *McIndoe v. Morman*, 26 Wis., 588.] *Ibid.*
3. An executory contract of sale of land provided that the vendee should go into possession, make certain improvements and pay certain taxes, and "hold as a tenant at sufferance, and liable to be expelled as a tenant holding over," on failure to make any payment as specified; and the vendee went into possession, and made default after some payments. *Held*, that the statutory proceeding for a recovery of possession by a landlord against a tenant in default, would not lie. *Ibid.*

VENUE. See CHANGE OF VENUE.

VERDICT.

See DAMAGES. EXEMPTION.

1. The court below having improperly permitted questions to be propounded to the jury (for special verdict) by which they were required to state, not only the *gross* amount of plaintiff's damages, but the several *items* composing it, and having twice sent them out to reconsider their verdict in consequence of inconsistencies in the answers, and the jury having made successive material changes in their assessments with no apparent reason except to make the general and special assessments consistent, this court holds that there was an abuse of the statutory right to a special verdict, and reverses the judgment on that ground. *Blesch v. C. & N. W. Railway Co.*, 168
2. Where the issue was, whether a sale of chattels to the plaintiff was fraudulent as to the vendor's creditors, the jury found specially that the vendor conveyed said chattels with certain real estate to plaintiff for a valuable and adequate consideration, expressed in the deed of conveyance, and that plaintiff did not then know that his vendor was indebted to any persons other than those holding mortgages on the premises, which plaintiff assumed to pay; but further found that at the time of the sale plaintiff knew that his vendor was in failing circumstances; that such vendor did not make the sale in good faith, without intent to defraud

his creditors; and that plaintiff knew of the vendor's fraudulent intent. *Held*, that the answers are inconsistent, and not sufficient to sustain a judgment against the plaintiff. *Fick v. Mulholland*, 310

3. Where defendant demanded generally, in due time, a special verdict (under R. S., sec. 2858), and the court thereupon submitted to the jury, for a special verdict, one only of several questions of fact involved in the issue and upon which there was conflicting evidence, and submitted the other questions for a general verdict upon proper instructions, and defendant, excepting to the particular question so specially submitted, and to the general instructions, did not specifically object to the failure of the court to submit other questions for special answers: *Held*, that the objection was waived. *Schultz v. C., M. & St. P. Railway Co.*, 375
4. After the bringing in of a special verdict, the court may send the jury back to make an answer more specific. *Fick v. Mulholland*, 413

WAIVER. See ADMINISTRATORS, etc., 4. APPEAL (A.), 1. EQUITY, 17. INSURANCE, etc., 7, 8. JUDGMENT (H.), 1. MECHANIC'S LIEN, 2. PARTITION, 2. PRACTICE, 4. VERDICT, 3.

WARRANTY. See INSURANCE, etc., 12. SALE OF CHATTELS, 3-7.

WILLS.

See EVIDENCE, 6.

1. In this case, this court, reversing a judgment of the circuit court, holds that the testatrix possessed testamentary capacity when the will was made; the questions being only as to the force of evidence. *Will of Sarah M. Blakely*, 294
2. The will was made April 7, 1876, and the incapacity alleged was dementia, accompanied by insane delusions. *Held*, that clear, sensible and perfectly coherent letters written by the testatrix during the year 1875, and as late as February, 1876, upon business and other matters, are entitled to considerable weight in determining the issue. *Ibid.*
3. The other evidence in the case, though showing eccentricity, caprice, fretfulness, and a suspicious and irritable temper, *held* not sufficient to establish either a lack of mental capacity in the testatrix, or insane delusions which would prevent the use of her faculties in disposing by will of her property. *The Chafin Will Case*, 32 Wis., 557; *Holden v. Meadows*, 31 id., 284; and *Burnham v. Mitchell*, 34 id., 117 — followed and approved. *Ibid.*
4. The weight to be given to the testimony of medical experts in such cases, somewhat considered. *Ibid.*

WITNESS. See CONTEMPT. COURT AND JURY, 2. CRIMINAL LAW, etc., 13.

WRIT.

1. *Of Fieri Facias.* See EXECUTION, 1, 2.

The execution, after the venue, began: "To the sheriff or any constable of said county, greeting:" but in the body thereof the command to levy was given "in the name of the state of Wisconsin." *Held*, sufficient in form. *Bean v. Loftus*, 371

2. *Of Attachment.* See ATTACHMENT.

3. *Of Mandamus.* See MANDAMUS.

4. *Of Assistance.*

A judgment of strict foreclosure of a land contract may provide that after the time thereby limited for payment, a writ of assistance shall issue if defendant refuses to surrender; that remedy being within the inherent power of chancery. *Diggle v. Boulden*, 477

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